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PROCEEDINGS

OF THE

American Philosophical Society

HELD AT PHILADELPHIA

FOR PROMOTING USEFUL KNOWLEDGE

VOL. LI. AUGUST–SEPTEMBER, 1912. NO. 206.

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THE TREATY-MAKING POWER OF THE UNITED STATES AND THE METHODS OF ITS ENFORCEMENT AS AFFECTING THE POLICE POWERS OF THE STATES

BY CHARLES H. BURR, ESQ.
OF PHILADELPHIA

THE CROWNED ESSAY FOR WHICH THE HENRY M. PHILLIPS PRIZE OF TWO THOUSAND DOLLARS WAS AWARDED, ON APRIL 20, 1912, BY THE AMERICAN PHILOSOPHICAL SOCIETY

COMMITTEE OF JUDGES

JOSEPH H. CHOATE, of New York JOHN C. GRAY, of Massachusetts
J. M. DICKINSON, of Tennessee HENRY WADE ROGERS, of Connecticut
JAMES BROWN SCOTT, of the District of Columbia

PHILADELPHIA
THE AMERICAN PHILOSOPHICAL SOCIETY
104 SOUTH FIFTH STREET
1912

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Burr, Charles Henry, 1869-

PROCEEDINGS

OF THE

AMERICAN PHILOSOPHICAL SOCIETY

HELD AT PHILADELPHIA

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VOL. LI AUGUST–SEPTEMBER, 1912 No. 206

THE HENRY M. PHILLIPS PRIZE ESSAY.

REPORT OF THE JUDGES.

PHILADELPHIA, March 30, 1912.

TO THE PRESIDENT AND COUNCIL
OF THE AMERICAN PHILOSOPHICAL SOCIETY,

Gentlemen:

The undersigned, a committee of Judges elected by the American Philosophical Society on December 1, 1911, to examine the Essays submitted to the Society in competition for the Henry M. Phillips Prize, respectfully report that they have examined with care the nine essays submitted for the prize, and, after personal consultation and discussion, have awarded the prize to the essay entitled "Sovereignty can only be an unit and must remain an unit.—Bismarck," which proves to be the work of Charles H. Burr, Esq., of Philadelphia. The Committee found very great difficulty in deciding between this essay and one written by "Historicus" [Edward S. Corwine, Esq., of Princeton, New Jersey].

JOSEPH H. CHOATE,
J. M. DICKINSON,
JOHN C. GRAY,
HENRY WADE ROGERS,
JAMES BROWN SCOTT.
Committee.

PROC. AMER. PHIL. SOC., LI. 206 O, PRINTED OCT. 21, 1912.

THE TREATY-MAKING POWER OF THE UNITED STATES AND THE METHODS OF ITS ENFORCEMENT AS AFFECTING THE POLICE POWERS OF THE STATES.

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THE TREATY-MAKING POWER OF THE UNITED STATES AND THE METHODS OF ITS ENFORCEMENT AS AFFECTING THE POLICE POWERS OF THE STATES.

By CHARLES H. BURR, Esq.,

of Philadelphia.

(*Read April 20, 1912.*)

The Crowned Essay for which the Henry M. Phillips Prize of two thousand dollars was awarded, on April 20, 1912, by the American Philosophical Society.

"Sovereignty can only be an unit, and must remain an unit."—*Bismarck.*

To the treaty-making power, the United States owes the possession of three-fourths of its territory. Yet, the very President who negotiated the first acquisition, denied the constitutional right he assumed to exercise when Louisiana was purchased, and justified by considerations of national expediency, the provisions of a treaty which he had declared to be an unwarranted usurpation of power.[1] In more recent history, when, following the Mafia riots, Italy withdrew her minister, the Secretary of State declared to that country and to the world, the powerlessness of the Federal government to afford redress for a violated treaty.[2] Again, but a few years since, when Japanese treaty rights seemed about to be ignored by California authorities, the then Secretary of State enunciated the supremacy of treaty provision over State law in uncompromising terms.[3]

Only with these and similar instances in mind, can one appreciate at once the far-reaching magnitude of the treaty-making power, and the confusion of ideas by the people and by publicists alike, con-

[1] See note 1.

[2] *Infra*, pp. 204–208.

[3] *Infra*, pp. 207–209.

cerning its extent and its effectiveness. Toward the clarification of those ideas, this essay is an attempt.

It is an unescapable essential in English law that the actual facts, the surrounding circumstances, the causes and the results, which make up a practical controversy brought up for practical decision, must be within the knowledge of those who judge, and guide their minds to the principles which both underlie and spring out of their decisions. The common law is an effort—so far as that effort may be available under the conditions—to apply the methods of induction in arriving at truth respecting the problems which life offers to a court for solution. Always there is present in the processes of the law a secondary and subordinate deductive application of principles theretofore evolved to the concrete facts of the particular cases newly arising; but in the larger sweep of time, the main effort of the common law is toward the determination of truth by the methods of induction.

The recognition of this inherent nature of English law must be ever present to the inquirer and student. Thus only will the law be conceived, as it is, an organic body, a thing living. The decided cases are the manifestations of its life, and these must be analyzed with all possible consideration of the facts out of which they came, the manner of thought of the times when they were decided, the stage of development which the principle of law sought to be examined had then reached. Language of a member of the Supreme Court of the United States used in delivering its opinions, carried with it quite different connotations, has for us today varying authoritative force, according to the period of our history when it was written. The same words have different implications and meanings and values, when uttered in the earliest days of the Supreme Court, in the years preceding the outbreak of the Civil War, in the Reconstruction period, in this twentieth century. It is for the student of law, with what historical knowledge he may possess, to endeavor to envisage the political conditions existing when the decisions examined were delivered; with what literary discrimination is his, to separate the salient and authoritative utterances of a

judge from the illustrative and ephemeral; with what power of inductive logic he has acquired, to trace through the recorded decisions the development and validity of the judicial conclusions reached. And however weak and inadequate may be the natural faculties and acquired knowledge of the student, let him and those who do him the honor of examining his work, remember that true method, laboriously and sincerely used, can alone reach valid results. The most brilliant *a priori* discussion of what the law will be found to be, must give place to the humblest study of what the law really is. The crowning advantage of true method is that the method, and not the student's genius, attains the goal. Grant only to the student capacity for sincerity and for labor, and, as he works by the historical method, the circumstances and political conditions of the time spread themselves out before us; the judges speak to us in language, the authority and prophecy underlying which we at this distance of time far better understand than did they; the slowly developing principles of law lie self-revealed before us in their beginnings, their growth, their maturity. The student is rightly forgotten, the method is all.

To collect together the cases relevant to our subject decided by the Supreme Court of the United States, and then to spread them before us in historical sequence for examination and analysis in the light of surrounding circumstances and preëxisting decisions, is the object of this essay. The assumption is general that such cases are few in number. A recent essay thus begins:

> "Something has been written on the extent of the treaty-making power of the President and the Senate. Little has been decided. . . . A very few cases have involved a determination of the extent of the treaty-making power, and in these few the point decided is so narrow, was so inadequately, or not at all argued, or has been rendered so doubtful by dicta of later judges of the Supreme Court as to leave the whole question open."[4]

This is a conclusion which has little foundation in fact. Rather must one prepare oneself for a great number of cases which require consideration, and the student must be careful not to obscure the

[4] "The Extent of the Treaty-making Power of the President and Senate of the United States," Professor William E. Mikell, *American Law Register*, Vol. 57, p. 435.

subject by losing himself in the immaterial. There are great enlightening constitutional cases, and a multitude of only illustrative and cumulative value. A sense of proportion must accompany one always. Therefore in this essay, with inconsiderable exceptions, the decisions of courts other than the Supreme Court of the United States have been, although examined, passed over without mention. And detailed analysis to show the irrelevancy of certain cases in the Supreme Court, has often been omitted. There remains a great wealth of significant and conclusive material.

Mingled, however, with problems of essentially legal nature are problems fundamentally *political.* These are, moreover, political problems of the greatest magnitude in a nation's life, arising as they do out of relations with the other powers of the world. By processes quite other than the calm slow advance of the English race toward the establishment of principles of law, will be determined the political scope of the treaty-making power of the United States. Sudden is the emergency, momentous the issues, on the *executive* rests primarily the decision; economic *desiderata,* party politics, the shrieks of journalism, the make-weight of individual temperament —one or all may influence the result; and the treaty is signed. One influence alone is not felt: the opinion of the Supreme Court of the United States. Years later that Court may be heard in explanation of the event, in support of it, in apology for it—never yet in the nation's history has the Court been heard in its undoing. It was thus when Louisiana was purchased, and Texas annexed; likewise in similar instances will it be again. So, at the beginning of this essay, and in no uncertain words, it has seemed best to endeavor to bring out in bold relief the thought that in their larger significance many of the problems involved in the exercise of the treaty-making power are political, and only subordinately and secondarily legal. Conclusions may therefore be found to lack sanction in legal reasoning while they find it in political considerations. And in attempting at times to forecast the future and suggest the line of development along which the attitude of the people of the United States toward the treaty-making power may proceed, such political considerations must necessarily have their place.

Before examining, however, into the primarily political questions affecting the treaty-making power which may present themselves for solution, it will be well to excerpt the clauses of the Constitution relative to that power. They are as follows:

"No State shall enter into any treaty, alliance, or confederation." *Article I, Section 10, Clause 1.*

"No State shall, without the consent of Congress . . . enter into any agreement or compact with any State, or with a foreign power." *Article I, Section 10, Clause 2.*

"He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur." *Article II, Section 2, Clause 2.*

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." *Article III, Section 2, Clause 1.*

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." *Article VI, Clause 2.*

The history of the adoption of these clauses by the framers of the Constitution in Federal Convention is interesting and has a certain significance.

It will be recalled that the Convention met in accordance with a resolution of the Congress of the Confederation adopted February 21st, 1787. The date named was May 14th, 1787, but it was not until May 25th that the Convention organized. On May 29th Governor Randolph of Virginia presented a series of resolutions to serve as leading principles in the formation of the new government. These, known as the Virginia plan, were discussed by the Convention sitting as a committee of the whole, and were severally amended, approved, or rejected. On June 15th, a series of resolutions, which became known as the New Jersey plan, was introduced. On July 26th, the Convention adjourned to August 6th, having appointed a committee of detail to prepare a constitution along the lines of the resolutions theretofore adopted. On August 6th the committee reported, and the Convention passed *seriatim* upon the provisions reported. On September 8th the committee of

style was appointed, which, on September 12th, reported the Constitution substantially as it was afterwards adopted. On September 15th the Convention adjourned.

The two clauses of Article I., Section 10, of the constitution existed in substance in the Articles of Confederation, where in the first and second paragraphs, respectively, of Article VI, it is said:

"No State, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty with any king, prince, or state. .... .

"No two or more states shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purpose for which the same is to be entered into, and how long it shall continue."

On August 6th the committee of detail reported the Articles XII. and XIII. as follows:

"No State shall coin money; nor grant letters of marque and reprisals; nor enter into any treaty, alliance, or confederation; nor grant any title of nobility."

"No State, without the consent of the Legislature of the United States, shall emit bills of credit, or make anything but specie a tender in payment of debts; nor lay imposts or duties on imports; nor keep troops or ships of war in time of peace; nor enter into any agreement or compact with another State, or with any foreign power; nor engage in any war, unless it shall be actually invaded by enemies, or the danger of invasion be so imminent, as not to admit of delay, until the Legislature of the United States can be consulted."[5]

The committee on style varied the expression of these provisions,[6] and just as the Convention was about to adjourn, the wording was still further but immaterially changed.[7]

The provision for making of treaties by the President and Senate, afterwards contained in the Second Section of the Second Article of the Constitution, was the subject of some controversy. In Governor Randolph's speech presenting what became known as the Virginia plan, he referred to dangers existing on account of State violations of treaties made under the Confederation, as con-

[5] Records of the Federal Convention, Max Farrand, Vol. II., p. 187.
[6] Ibid., p. 597.
[7] Ibid., p. 621.

stituting one of the paramount considerations which should move the Convention to form an effective Federal government; but his fifteen resolutions do not in any way cover the subject of treaties.[8] The inference would seem to be that he assumed that Congress, as the treaty-making power under the Confederation, would likewise exercise the power under the Constitution. However that may be, the first mention of the treaty-making power occurs in the New Jersey plan on June 15th, where the reference is to the extension of the judicial power to questions arising under treaties, and to the enforcement of treaties.[9] When the committee of detail reported a draft of the Constitution on August 6th, the First Section of the Tenth Article according to the then arrangement, was as follows:

"The Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court."[10]

On August 15th Colonel Mason, of Virginia, seconded a motion to take the power of originating revenue bills from the Senate, and Madison's notes say:

"He was extremely earnest to take this power from the Senate, who he said could already sell the whole country by means of treaties."[11]

The notes next record the speech of Mr. Mercer of Maryland:

"He contended (alluding to Mr. Mason's observations), that the Senate ought not to have the power of treaties. This power belonged to the Executive department; adding that treaties would not be final so as to alter the laws of the land, till ratified by legislative authority. This was the case of treaties in great Britain; particularly the late Treaty of Commerce with France.

"Col. Mason did not say that a treaty would repeal a law; but that the Senate by means of treaty might alienate territory &c., without legislative sanction. The cessions of the British Islands in W— Indies by treaty alone were an example—If Spain should possess herself of Georgia therefore the Senate might by treaty dismember the Union."[12]

On August 23rd the provision in the form that it came from the committee of detail, giving the power of making treaties to the Senate, came before the Convention. The report of the proceedings by

[8] Farrand, Vol. I., pp. 20–2.
[9] Ibid., p. 245.
[10] Farrand, Vol. II., p. 183.
[11] Ibid., p. 297.
[12] Ibid., p. 297.

Madison is instructive. He urges that the president should be an agent in making treaties. Gouverneur Morris moved an amendment: "but no treaty shall be binding on the United States which is not ratified by a law." This was opposed by several on the ground of the practical difficulty it would cause in negotiations, and the amendment was defeated by a vote of 8 to 1, one State being divided. The report, given in full in the appended notes,[13] concludes thus:

"Mr. Madison hinted for consideration, whether a distinction might not be made between different sorts of treaties—allowing the President and Senate to make treaties eventual and of alliance for limited terms—and requiring the concurrence of the whole Legislature in other treaties."[14]

On August 31st, a committee of one member from each State was appointed, to whom were referred the parts of the Constitution, consideration of which had been postponed.[15] This committee reported on September 4th. In this report, the clause stood:

"The President by and with the advice and consent of the Senate, shall have power to make treaties. . . . But no treaty shall be made without the consent of two thirds of the members present."[16]

On September 7th this section came up for adoption. Madison's record says:

"Mr. Wilson moved to add, after the word 'Senate' the words, 'and House of Representatives.' As treaties he said are to have the operation of laws, they ought to have the sanction of laws also. The circumstance of secrecy in the business of treaties formed the only objection; but this he thought, so far as it was inconsistent with obtaining the Legislative sanction, was outweighed by the necessity of the latter.

"Mr. Sherman thought the only question that could be made was whether the power could be safely trusted to the Senate. He thought it could; and that the necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature.

"Mr. Fitzsimmons 2ded. the motion of Mr. Wilson, and on the question

"N. H. no. Mas. no. Ct. no. N. J. no. Pa. ay. Del. no. Md. no. Va. no. N. C. no. S. C. no. Geo. no.

"The first sentence as to making treaties was then agreed to; nem: con:"[17]

[13] See note 2.
[14] Farrand, Vol. II., pp. 392–4.
[15] Ibid., p. 481.
[16] Ibid., p. 495.
[17] Ibid., p. 538.

Later this same day the final sentence of the clause was before the Convention. Madison's report continues:

"Mr. Wilson thought it objectionable to require the concurrence of two thirds which puts it in the power of a minority to control the will of a majority.

"Mr. King concurred in the objection; remarking that as the Executive was here joined in the business, there was a check which did not exist in Congress where the concurrence of two-thirds was required.

"Mr. Madison moved to insert after the word 'treaty' the words 'except treaties of peace' allowing these to be made with less difficulty than other treaties—It was agreed to nem: con:"[18]

The report then relates that Madison further moved to amend by permitting treaties of peace to be negotiated by two thirds of the Senate without the concurrence of the President.[19] This was defeated.[20]

On September 8th a reconsideration of the whole clause was agreed to, and the following motions were made with the indicated results:

That the words "except treaties of peace" be stricken out: ayes 8; noes 3.

That two thirds of the Senate must concur be stricken out: ayes 1; noes 9; divided 1.

That no treaty be made with the consent of two thirds of all the members of the Senate: ayes 3; noes 8.

That a majority of all the Senators suffice: ayes 5; noes 6.[21]

In the report of the committee of style the existing form was adopted.[22]

The sixth resolution offered by Governor Randolph had enumerated among the powers given to Congress the right "to negative all laws passed by the several States, contravening in the opinion of the national legislature, the articles of union."[23] The twelfth resolution had included among the subjects of Federal judicial jurisdiction, "questions which may involve the national peace and harmony."[24] On May 31st this resolution passed with the amendment

[18] Ibid., p. 540.
[19] Ibid., p. 541.
[20] See note 3.
[21] Farrand, Vol. II., p. 544.
[22] Ibid., p. 599.
[23] Farrand, Vol. I., p. 21.
[24] Ibid., p. 22.

added on motion of Benjamin Franklin of the words: "or any treaties subsisting under the authority of the Union."[25] On June 8th the reconsideration of this resolution was moved and a long discussion ensued between those who felt the power was necessary to insure Federal effectiveness, and those who, like Mr. Williamson, of North Carolina, feared it "might restrain the States from regulating their internal police."[26] The resolution was eventually disapproved by a majority.[27] On June 13th the twelfth resolution was adopted.[28] On June 15th the New Jersey plan was submitted, which specially included within the jurisdiction of the Federal judiciary, cases "in the construction of any treaty or treaties."[29] When the committee of detail reported, the power given to Congress by the sixth resolution of the Virginia plan had disappeared, and the jurisdiction of the United States Supreme Court was declared to extend "to all cases arising under laws passed by the Legislature of the United States."[30] No reference to cases arising under treaties was included. A series of amendments then ensued. The judicial power was declared to extend to cases in equity as well as at law.[31] In addition "to all cases arising under laws" were included those arising under the Constitution[32] and under treaties.[33]

The committee of style reported this provision in the form in which it now appears[34] if one except an immaterial verbal alteration, later made.[35]

As with the judiciary provisons of Article III. of the Constitution, which remained unconceived so long as the national legislature was regarded as the proper body to negative unconstitutional State laws, so also was it with Article VI. Its seed is to be found not in the Virginia plan but in the New Jersey resolutions offered on June 15th. The sixth was as follows:

"Res'd. that all acts of the United States in Congress made by virtue and in pursuance of the powers hereby and by the articles of confederation

[25] Ibid., p. 47.
[26] Ibid., p. 164.
[27] Farrand, Vol. II., pp. 21–2.
[28] Farrand, Vol. I., p. 232.
[29] Ibid., p. 244.
[30] Farrand, Vol. II., p. 186.
[31] Ibid., p. 428.
[32] Ibid., p. 430.
[33] Ibid., p. 431.
[34] Ibid., p. 576.
[35] Ibid., p. 621.

vested in them, and all treaties made and ratified under the authority of the United States shall be the supreme law of the respective States so far forth as those acts or treaties shall relate to the said States or their citizens, and that the judiciary of the several States shall be bound thereby in their decisions, anything in the respective laws of the individual States to the contrary notwithstanding; and that if any State, or any body of men in any State shall oppose or prevent ye carrying into execution such acts or treaties, the federal Executive shall be authorized to call forth ye power of the Confederated States, or so much thereof as may be necessary to enforce and compel an obedience to such Acts, or an observance of such treaties."[36]

On July 17th the sixth resolution of the Virginia plan was defeated, and Luther Martin of Maryland moved the following resolution which was unanimously adopted:

"That the legislative acts of the United States made by virtue and in pursuance of the articles of union, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective States, as far as those acts or treaties shall relate to the said States, or their citizens and inhabitants—and that the judiciaries of the several States shall be bound thereby in their decisions, anything in the respective laws of the individual States to the contrary notwithstanding."[37]

The committee of detail reported the section in the following form:

"The acts of the Legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States shall be the supreme law of the several States, and of their citizens and inhabitants; and the judges in the several States shall be bound thereby in their decisions; anything in the Constitution or laws of the several States to the contrary notwithstanding."[38]

On August 23rd the first clause was changed to read: "This Constitution and the laws of the United States made in pursuance thereof."[39] On August 25th the words "or which shall be made" were inserted to cover treaties preëxisting. So modified, the provision received unanimous approval.[40] It remained thereafter unaltered by the Convention except by its action in approving the form given to it by the committee of style.[41]

The general plan of the Constitution would seem to be simple. The Federal power is divided into the legislative, the executive, and the judicial. The legislative, limited to certain enu-

[36] Farrand, Vol. I., p. 245.
[37] Farrand, Vol. II., pp. 28–9.
[38] Ibid., p. 183.
[39] Ibid., p. 389.
[40] Ibid., p. 417.
[41] Ibid., p. 603.

merated subjects, is vested in Congress composed of two houses, one intended to be representative of the several States and the other of the people at large. The executive power is committed to the President; the judicial power is established in the Supreme Court, and in such inferior courts as may be ordained by Congress. The treaty-making power occupies an anomalous position. It is given to the President acting in conjunction with two-thirds of the Senate, and the judicial power is declared to extend to cases arising under treaties. Finally there is inserted the solemn declaration that the Constitution, the laws of the United States, and all treaties, shall be supreme law above the constitution and laws of each State. The amendments to the Constitution neither expressly nor apparently affect the treaty-making power or its exercise. The first ten were adopted immediately after the ratification of the Constitution, and of these all but the last two were intended and have been interpreted to operate as restraints on Federal action. These two constitute a specific reservation to the States of all powers not delegated to the United States nor prohibited to the States by the Constitution.

When one comes to deal with the problems arising out of the exercise of the treaty-making power, it is essential to appreciate one basic fact: that the treaty-making power is in its essence a power to deal with *parties*—all other powers granted to the Federal government or reserved to the States, are powers to deal with *subjects*. About to enter into the consideration of controverted problems, one seeks for words with which to emphasize and throw into high relief this determining consideration. Always must it be borne in mind as a significant factor in the problem, and to recognize it, is often to find the answer. A treaty is a contract made with another sovereignty. It is the fact that the contract is made with a sovereign nation—that is, made with a certain *party*—which constitutes it a treaty. On the other hand, it is the nature of the *subject* legislated upon which brings it within the power of Congress, or relegates it to the States. Attempts to reconcile, or rather to make mutually consistent, the treaty clauses of the Constitution and, for example, those clauses giving power of legislation to Con-

gress, must fail, unless there is borne constantly in mind this fundamental distinction between the powers granted. If there be given to A the power to contract with X, and to B the power to make regulations on certain subjects affecting X, and to C the power to make regulations on other subjects affecting X; then what shall result when the provisions of an agreement made by A with X conflict with regulations of B or of C?

The fundamental nature of the questions which underlie an examination into the treaty-making power of the United States is best appreciated by the algebraic statement of the problem just attempted. It will be well to restate it in equivalent concrete forms. These are:

First: When a treaty deals with a subject upon which Congress is authorized to legislate, is such treaty valid? or perhaps we should rather ask, what is its status?

Second: When a treaty deals with a subject upon which the States as opposed to Congress are authorized to legislate, is such treaty valid? or perhaps we should rather ask, what is its status?

On the correct answer to these two fundamental questions must depend any understanding of the status and efficacy of the treaty-making power of the United States. The Federal government as an entity can alone make treaties. Such is the emphatic provision of the Constitution. There is therefore no distribution of the treaty-making power between the Federal government on the one hand and the several States, on the other, as is the case with the executive, the judicial, and the legislative power. An executive act may be by a State governor or by the President, a court decree may be that of a State or a Federal court, a statute may be the act of a State legislature or of Congress. If a *treaty* is to be made, it is the United States alone which must make it; no State may make it or join in it. In this sense therefore the power of the United States to make treaties is unlimited. There remains however a field of controversy of far more intricate and important significance; the field already indicated, created when the treaty made with a sovereign party (or individual rights maintained or secured by the treaty) impinges on certain *subjects* committed to Congress, it may be, or

reserved to the States, as subjects of legislation. Two forces then enter the same field. Shall either dominate wholly? Shall each prevail in part? Is compromise possible?

It will therefore be the main purpose of this essay to examine inductively the *data* available for the solution of these two problems: the power of President and Senate, first, as opposed to Congress; and, second, as opposed to the several States. Finally, when the true relationships shall have been realized, an understanding of the methods of enforcing rights recognized or granted by treaty should naturally follow. But before an examination of the fundamental problems relating to the exercise of the treaty-making power be attempted, one must pause for a preliminary observation, even though it be *a priori* in its nature. The subject of treaties is rarely touched upon by essayists or text-book writers without a statement being made to the effect that a treaty may not be made to change the nature of our government, alter its departmental structure, or operate to deprive one department of a delegated power. A treaty could not, it is repeatedly said, provide that hereafter a particular State should have three senators. The reason for this position set forth in one form or another is always substantially to the effect that a power granted under an instrument must not be so construed as to change the instrument, or, in a more exaggerated instance, to destroy it. That argument—although not without the appearance and perhaps some reality of validity—misses the mark.

On altogether simple lines the Constitution of the United States was evolved. Certain fundamental principles were adopted and formulated; applications of those principles, details of organization were left to time and the nation that was to come. There was established the executive department, the judicial, the legislative. To this last were committed certain subjects of legislation—all others being reserved to the States. The power of this new government to treat with other sovereignties remained. It was confided to the President and Senate acting by a two-thirds majority of those present. Then, by express provision, the power to enter into any treaty was prohibited to the States. Why was not the treaty-making power expressly inhibited from nullifying the other provisions of the

Constitution? The answer is because neither its framers nor its numerous contemporary critics ever imagined the possibility of such an event. It is urged that they were right. A treaty-making power is a power to make treaties. And provisions looking to the accomplishment of an internal change in the government of one sovereign party to a treaty, are not and could not be subjects, properly speaking, of a treaty. To the minds which framed the Constitution and within the intendment of that instrument, treaties must only contain provisions which in the usual and normal intercourse of nations should properly become the subjects of treaties. It would seem to be unnecessary, if not misleading, to seek any further reason why a treaty may not make the President the presiding officer of the Supreme Court, or deprive the State of Nevada of its Senators. A *colorable* exercise of a power—and the word assumes too much—is not a valid exercise of the power. There is no judicial decision to such effect; but the *a priori* assertion may be ventured, that a treaty must be a treaty within the meaning of that word in international usage.

I.

The first problem respecting the treaty-making power of the United States having a wholly political character arose early in its history. In 1794, the British treaty was signed. France was at war with Great Britain, and the general sentimental affection of the American people for France was conceived by many to be outraged. The treaty was, *inter alia,* a treaty of commerce, and it was considered to operate unequally. A storm of protest burst forth which reëchoed over the country in resolutions denouncing the treaty. In a meeting held at Richmond it was declared that the treaty was "insulting to the dignity, injurious to the interests, dangerous to the security, and repugnant to the Constitution of the United States."[42] The resolutions adopted by the legislature of Virginia were couched in more parliamentary language, but were to the same effect. Nevertheless, on February 29th, 1796, Washington proclaimed the treaty as being the supreme law of the land. And on March 1st, he

[42] 112 U. S., p. 753.

PROC. AMER. PHIL. SOC., LI. 206 P, PRINTED SEPT. 10, 1912.

transmitted a copy thereof to Congress. The House was dominated by the party opposed to Washington and the Federalists. John Marshall was then a member of the House, and in his "Life of Washington" has summarized the positions taken.

"By the friends of the administration, it was maintained," he writes, "that a treaty was a contract between two nations, which, under the constitution, the President, by and with the advice and consent of the Senate, had a right to make, and that it was made when, by and with such advice and consent, it had received his final act. Its obligations then became complete on the United States, and to refuse to comply with its stipulations, was to break the treaty, and to violate the faith of the nation.

"By the opposition it was contended, that the power to make treaties, if applicable to every object, conflicted with powers which were vested exclusively in Congress. That either the treaty-making power must be limited in its operation so as not to touch objects committed by the constitution to Congress, or the assent and co-operation of the House of Representatives must be required to give validity to any compact so far as it might comprehend those objects. A treaty, therefore, which required an appropriation of money, or any act of Congress to carry it into effect, had not acquired its obligatory force until the House of Representatives had exercised its powers in the case. They were at full liberty to make or to withhold such appropriation, or other law, without incurring the imputation of violating any existing obligation, or of breaking the faith of the nation."[43]

A resolution passed requesting the President to lay before the House the papers relating to the treaty.

"It was," says Marshall, "a subject for serious reflection, that in a debate unusually elaborate, the House of Representatives had claimed a right of interference in the formation of treaties, which, in the judgment of the President, the Constitution had denied them."[44]

Washington's reply is of the greatest importance and is appended in full in the notes.[45]

"Having been," he said, "a member of the General Convention, and knowing the principles on which the Constitution was formed, I have ever entertained but one opinion upon this subject; and from the first establishment of the Government to this moment, my conduct has exemplified that opinion. That the power of making treaties is exclusively vested in the President, by and with the advice and consent of the senate, provided two-thirds of the

[43] Marshall's "Life of Washington," 1st ed., Vol. V., Chap. VIII., pp. 651–2.

[44] *Id.*, p. 654.

[45] See note 4.

senators present concur; and that every treaty so made and promulgated, thenceforward becomes the law of the land."

Washington further pointed out that this had been the construction which had obtained in the State conventions; and that the proposition "that no treaty should be binding on the United States which was not ratified by a law" had been explicitly rejected in the Federal Convention.

"A just regard to the Constitution and to the duty of my office," he concluded, "forbid a compliance with your request."

One month after the receipt of this message, the House passed an appropriation for carrying the treaty into effect.[46] Previously, however, they had answered the President in resolutions disclaiming the power to interfere in making treaties, but asserting their right to determine on the expediency of carrying into effect whatever treaty stipulations be made on subjects committed to Congress. The language of the resolution is appended in note 5.

The position taken by the House in 1796, accurately summarized by Marshall, has been persistently maintained. The treaty of 1815 with Great Britain was a commercial treaty providing also that no tariff discrimination should obtain. The existing laws embodied such discrimination and the Senate adopted a declaratory act in which they provided that such laws should be "taken to be of no force and effect." The declaratory nature of this act was distasteful to the House, and that body passed a new bill reënacting the treaty provisions. In the course of the debate, Mr. King of Massachusetts said:

"Whenever a treaty or convention does, by any of its provisions, encroach upon any of the enumerated powers vested in the Constitution in the Congress of the United States, or any of the laws by them enacted in execution of those powers, such treaty or convention, after being ratified, must be laid before Congress, and such provisions cannot be carried into effect without an act of Congress."[47]

And he added as an instance a treaty which would affect "duties on imports, enlarging or diminishing them." A conference committee

[46] Annals of Congress, 4th Congress, First Session, p. 1291.
[47] Annals of Congress, 14th Congress, 1st Sess., p. 538.

was appointed. In the report to the House of its conferees they say:

"[The Committee] are persuaded that the House of Representatives does not assert the pretension that no treaty can be made without their assent; nor do they contend that in all cases legislative aid is indispensably necessary, either to give validity to a treaty, or to carry it into execution. On the contrary, they are believed to admit, that to some, nay many treaties, no legislative sanction is required, no legislative aid is necessary.

"On the other hand the committee are not less satisfied that it is by no means the intention of the Senate to assert the treaty-making power to be in all cases independent of the legislative authority. So far from it, that they are believed to acknowledge the necessity of legislative enactment to carry into execution all treaties which contain stipulations requiring appropriations, or which might bind the nation to lay taxes, raise armies to support navies, to grant subsidies, to create States, or to cede territory; if indeed this power exists in the government at all. In some or all of these cases, and probably in many others, it is conceived to be admitted, that the legislative body must act, in order to give effect and operation to a treaty; and if in any case it be necessary, it may confidently be asserted that there is no difference in principle between the Houses; the difference is only in the application of the principle. For if, as has been stated, the House of Representatives contend that their aid is only in some cases necessary, and if the Senate admit that in some cases it is necessary, the inference is irresistible, that the only question in each case that presents itself is, whether it be one of the cases in which legislative provision is requisite for preserving the national faith or not."[48]

And they added relative to the point in dispute:

"The Senate believe legislation unnecessary. The House regard it as indispensable."

The Senate conferees reported:

"Even a declaratory law . . . is a matter of mere expediency, adding nothing to the effect of the treaty, and serving only to remove doubts hereafter that existed."[49]

Finally an amended declaratory act passed both houses of Congress.

In 1844, a proposed reciprocity treaty with Prussia was rejected by the Senate, after a report by a committee antagonistic to President Tyler, in which the constitutionality of the treaty was denied. This action of the Senate finds its explanation, it is believed, in the extraordinary political conditions created by the accession to the

[48] Ibid., pp. 1019–20.
[49] Ibid., p. 160.

presidency of the Vice-President, a southern Democrat, after the death of President Harrison, a Whig.[50]

Again in 1868, the House of Representatives raised the question as to its duties and rights respecting an appropriation for the payment to Russia of the purchase price of Alaska under the treaty of 1867. At first the House, in the Bill passed by that body, recited the alleged necessity of assent by them, and then assumed to give such assent. The Senate rejected the Bill and threw it into conference. One of the House conferees in explanation of his report said:

"The Committee on the part of the Senate stated freely and frankly that they could in no event consent to the preamble and that the Senate would not consent, and that they held that the House was bound to carry out the stipulations of all treaties, and that when a treaty provided for the payment of money for any purpose, that such stipulation created a debt, and that the House has no discretion in relation to the payment of the same, a doctrine of course utterly at variance with the law and with the principles asserted in the preamble as it passed the House; and it is manifestly impossible to reconcile opinions so utterly at variance upon so important a question. A majority of the Committee on the part of the House could in no event consent to any such doctrine so utterly subversive of the rights and constitutional prerogatives of the House."[51]

The Bill was finally passed containing the following recital:

"Whereas said stipulations cannot be carried into full force and effect except by legislation to which the consent of both Houses of Congress is necessary."[52]

In 1887, a proposed extension of the Hawaiian treaty had been negotiated, and ratified by the Senate. The original treaty of 1875 had provided that it should not become effective "until a law to carry it into operation shall have been passed by the Congress of the United States of America." The question of the prerogatives of the House in the matter was raised in that body and referred to the judiciary committee. In its report that committee said:

"The President, by and with the advice and consent of the Senate, cannot negotiate a treaty which shall be binding on the United States, whereby

[50] See Senator Cullom's analysis: *Congressional Record,* Vol. 35, Part II., p. 1081.

[51] *Congressional Globe,* 40th Cong., 2nd Sess., Part V., p. 4393.

[52] *Congressional Globe,* 40th Cong., 2nd Sess., Part V., p. 4394.

duties on imports are to be regulated, either by imposing or remitting, increasing or decreasing them, without the sanction of an act of Congress; and that the extension of the term for the operation of the original treaty or convention with the government of the Hawaiian Islands, proposed by the supplementary convention of December 6, 1884, will not be binding on the United States without like sanction, which was provided for in the original treaty and convention, and was given by act of Congress."[53]

The report does not seem to have been adopted by the House, and no Act of Congress extending the provisions of the treaty of 1875 was passed.[54]

In 1897, the tariff act known as the Dingley Act was passed. By the third section thereof the act purported to "authorize" the president to negotiate commercial reciprocity agreements on certain articles therein enumerated, and provided that he might suspend after the making of such agreement the operation of the tariff act. The fourth section purported to prescribe the method and effect of such agreements. It provided that whenever the president "by and with the advice and consent of the Senate . . . , shall enter into commercial treaty or treaties" concerning duties "and when any such treaty shall have been duly ratified by the Senate and approved by Congress, and proper proclamation made accordingly, then and thereafter the duties" shall be accordingly collected.

In 1902, Senator Cullom reviewed in the Senate the history of the exercise of the treaty-making power His speech is marked by its accurate fulness and persuasive logic, and thus concludes:

"The authority of the House [of Representatives] in reference to treaties has been argued and discussed for more than a century, and has never been settled in Congress and perhaps never will be. The House, each time the question was considered, insisted upon its powers, but nevertheless has never declined to make an appropriation to carry out the stipulation of a treaty, and I contend that it was bound to do this, at least as much as Congress can be bound to do anything when the faith of the nation had been pledged. And this appears to me to be the only case in which any action by the House is necessary, unless the treaty itself stipulates, expressly or by implication, for such Congressional action."[55]

[53] *Congressional Record,* Vol. 18, Part III., p. 2721. Language given Vol. 35, Part II., p. 1182.

[54] U. S. Stat. at Large, Vol. 30, pp. 203–4.

[55] *Congressional Record,* Vol. 35, Part II., p. 1083.

The House responded with the following resolution:

"Whereas, it is seriously claimed that under the treaty-making power of the government, and without any action whatever on the part of the House of Representatives, or by Congress, reciprocal trade agreements may be negotiated with foreign governments that will of their own force operate to supplant, change, increase, or entirely abrogate duties on imports collected under laws enacted by Congress and approved by the executive for the purpose of raising revenue to maintain the government: Now, therefore, be it

"Resolved by the House of Representatives that the Committee on Ways and Means be directed to fully investigate the question of whether or not the President, by and with the advice and consent of the Senate, and independent of any action on the part of the House of Representatives, can negotiate treaties with foreign governments for the purpose of raising revenue are modified or repealed, and report the result of such investigation to the House."[56]

This resolution was allowed to die in Committee.

In 1902, a treaty was signed with Cuba under which a preferential duty on imports into the United States was granted. The treaty provided that it should "not take effect until the same shall have been approved by Congress."[57] An act was then passed by Congress entitled "An Act to carry into effect a Convention between the United States and the Republic of Cuba," which concluded with the following proviso:

"That nothing herein contained shall be held or construed as an admission on the part of the House of Representatives, that customs duties can be changed otherwise, than by an act of Congress, originating in said House."[58]

In 1911, a Canadian reciprocity tariff was negotiated, and it is significant that on the part of the United States, no treaty was signed, but that an act of Congress was passed of which the third section is as follows:

[Be it enacted] "That for the purpose of further readjusting the duties on importations into the United States of article or articles the growth, product, or manufacture of the Dominion of Canada, and of the exportation into the Dominion of Canada of article or articles the growth, product, or manufacture of the United States, the President of the United States is authorized and requested to negotiate trade agreements with the Dominion of Canada wherein mutual concessions are made looking toward freer trade

[56] *Congressional Record*, Vol. 35, Part II., p. 1178.

[57] Compilation of Treaties in force, 1904, p. 225.

[58] 33 Stat. at Large, 3.

relations and the further reciprocal expansion of trade and commerce: Provided, however, that said trade agreements before becoming operative shall be submitted to the Congress of the United States for ratification or rejection."

The Presidents of the United States have uniformly supported the view of Washington. In addition to maintaining this attitude in the instances above set forth, we may cite the following examples. In 1835, President Jackson vetoed a bill for the compromise of claims allowed by the commissioners under a treaty. He said:

"The Act is, in my judgment, inconsistent with the division of powers in the Constitution of the United States, as it is obviously founded on the assumption that an act of Congress can give power to the Executive or to the head of one of the Departments to negotiate with a foreign government."[59]

In 1877, President Grant vetoed congressional resolutions directing the Secretary of State to convey to certain republics the good wishes of Congress on the ground that in the executive alone was vested the right to conduct all correspondence with other sovereignties.[60]

It would seem to be idle to enter into a long discussion of the constitutional problem presented if the House of Representatives should refuse to pass an appropriation necessary to carry a treaty into effect. It is a problem political and national in its character and not one for judicial arbitrament or determination. The question presented, however, is simple enough and readily yields to analysis. A treaty agreeing to pay money is none the less a treaty, whether or no the money be paid. It constitutes an executory contract and raises an obligation on the part of the United States to perform its contract. Congress could repudiate this obligation, just as a corporation by its board of directors could refuse to honor its duly executed obligation. But the power to make a valid treaty would be untouched by such repudiation: the United States would remain bound in international law. Congress, however, has never yet in its history refused to recognize the obligation resting upon it, and it is unlikely it ever will. If it should, the offended nation would have whatever redress would be open to it under the principles of international law. The courts of the United States could not determine such a controversy of purely national and political import.

[59] Richardson's Messages of the Presidents, Vol. III., p. 146.
[60] Id., Vol. VII., pp. 430–2.

So far as the question is raised by the quotations above made as to the power of the President and Senate to enter into commercial treaties and so affect the tariff laws, it will be seen that this question is one which may involve individual rights and so become the subject of judicial determination. Its further consideration will therefore be postponed till the inductive study of the decisions of the Supreme Court of the United States be had.[61]

The acquisition or cession of territory, however, by the United States, involves problems of wholly national and political import. The power of the United States to *acquire* territory by the exercise of the treaty-making power is firmly established and has been exercised in a series of treaties. In 1803 Louisiana was ceded by France; in 1819 Florida by Spain; in 1848 California and New Mexico by Mexico; in 1867 Alaska by Russia; and in 1899 Porto Rico and the Philippine Islands by Spain.

The exercise of the treaty-making power relative to the acquisition of Florida came before the Supreme Court in American Insurance Company *vs.* Canter,[62] and was judicially sanctioned.

"The Constitution," said Mr. Chief Justice Marshall, in delivering the opinion of the Court, "confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty."[63]

A long series of cases recognizes without question and discusses this power to acquire territory by treaty. The extent and operation of this power receives the most thorough criticism in the Insular Cases.[64] In those cases there was not directly in issue the extent of the treaty-making power with reference to the acquisition of

[61] *Infra,* 100–105.

[62] 1 Peters, 511 (1828).

[63] 1 Peters, p. 542.

[64] These are: De Lima *vs.* Bidwell, 182 U. S., 1 (1901), Downes *vs.* Bidwell, 182 U. S., 244 (1901). Directly connected with these cases, but establishing no additional principles are: Dooley *vs.* United States, 182 U. S., 222 (1901), Dooley *vs.* United States, 183 U. S., 151 (1901), Fourteen Diamond Rings, 183 U. S., 176 (1901). More recently the same principles have been reënunciated in Lincoln *vs.* United States, 197 U. S., 419 (1905), 202 U. S., 484 (1906), Pearcy *vs.* Stranahan, 205 U. S., 257 (1907), United States *vs.* Heinszen, 206 U. S., 370 (1907).

territory or otherwise. None of the six judges who directly expressed themselves even questioned the manner of the exercise of the treaty-making power in the cases at bar. There was no possible occasion for such criticism. By the treaty the determination of the civil rights and political status of the inhabitants of the islands was left to Congress, and Congress by a series of acts appropriated money, ratified the treaty, and proceeded to provide for the government of the acquired territory. By reason, however, of the comments of the members of the Court, these cases will repay careful and detailed examination. One must beware of seizing upon the remarks of any one of the judges without the most careful reference to its connection with his course of argument and to the issue presented. This is always a wise caution; it is here a vital one; for, in these cases, four judges agreed in the main, one with the other; four others, while agreeing one with the other, absolutely repudiated the reasonings and conclusions of the first four; while the ninth judge, by alternately voting with each group, determined the decision in both cases. The facts were simple and are as follows:

On April 11th, 1899, the treaty ceding Porto Rico to the United States was ratified and proclaimed. On April 12th, 1900, the Foraker Act was passed, creating civil government for the Island, and providing for the collection of tariff duties on imports therefrom into the United States. In DeLima *vs.* Bidwell the question was as to the application of the existing United States tariff to imports between the date of the ratification of the treaty and the time when the Foraker Act took effect. In Downes *vs.* Bidwell the question was as to the constitutionality of the Foraker Act, which admittedly did not comply with the provision of the Constitution that "all duties, imports, and excises shall be uniform throughout the United States." The Chief Justice and Justices Harlan, Brewer, and Peckham were of the opinion that when Porto Rico was ceded to the United States, and, by the terms of the treaty and the action of Congress, a civil government was therein created, the provisions of the Constitution at once applied; that the island could not be termed foreign territory after the ratification of the treaty; that consequently the existing tariff law attempted to be enforced in DeLima *vs.* Bidwell had no

application; and that, once Porto Rico became organized territory of the United States, the provisions of the Constitution including the restriction imposing uniformity of taxation, applied, and the Foraker Act, attempted to be enforced in Downes *vs.* Bidwell, was unconstitutional and void. To this Justices McKenna, Shiras, White, and Gray rejoined that "Porto Rico occupied a relation to the United States between that of being a foreign country absolutely and of being domestic territory absolutely"; that Congress was only empowered to act in any case subject to the applicable limitations of the Constitution; that Porto Rico had not been incorporated into the United States so as to bring it within the provisions of Article I., Section 9, of the Constitution; that therefore Porto Rico could not become domestic territory without the action of Congress: and consequently that the existing tariff act applied in DeLima *vs.* Bidwell and the Foraker Act in Downes *vs.* Bidwell. Mr. Justice Brown was of the opinion, however, that a country could not be domestic for one purpose and foreign for another; and that Porto Rico was wholly domestic territory. He thought, however, that Article I., Section 9, had no application to the islands which could not be regarded as part of the United States within the meaning of that clause, but should rather be spoken of as "a territory appurtenant and belonging to the United States." His vote therefore determined the decisions in the two cases alternately in favor of and against the two groups consisting each of four justices. It is submitted that the position of Mr. Justice Brown is in substance with the four who prevailed in Downes *vs.* Bidwell. In the first place, the *effect* of the decisions is that Congress has the power henceforth to legislate for territory acquired by treaty, without being subject to customary restrictions on such legislation provided in the constitution. In the second place, while the language of Mr. Justice Brown to the effect that territory acquired by treaty forthwith becomes domestic and cannot for any purposes be regarded as foreign, may seem to be flatly opposed to the position of Mr. Justice McKenna and Mr. Justice White, as set forth in their respective opinions; yet when he grants (as in Downes *vs.* Bidwell) that though "domestic territory," the Constitution is not applicable as

a whole, the difference is seen to be verbal rather than substantial. Indeed, Mr. Justice McKenna and those who concurred with him, might, without departure from the principles enunciated by him, have agreed in the reversal in DeLima *vs.* Bidwell, basing their action on the fact that the status of Porto Rico was not that of foreign territory within the meaning of the existing tariff act. An analysis shows that the decisions in Fleming *vs.* Page[65] and in Cross *vs.* Harrison[66] were the influential determining cases. Mr. Justice Brown concludes his prevailing opinion in Downes *vs.* Bidwell with this paragraph:

"Patriotic and intelligent men may differ as to the desirableness of this or that acquisition, but this is solely a political question. We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively demands it. A false step at this time might be fatal to the development of what Chief-Justice Marshall called the American Empire. Choice in some cases, the natural gravitation of small bodies toward large ones in others, the result of a successful war in still others, may bring about conditions which would render the annexation of distant possessions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles may for a time be impossible; and the question at once arises whether large concessions ought not to be made, that, ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is any thing in the Constitution to forbid such action."[67]

Nothing could illustrate better than the above quotation the essentially political and economic nature of the problems presented. Reading the lengthy opinions in these cases (the reports of which cover 391 pages), one appreciates the broad character of the outlook of the Justices who decided them. But it is as statesmen truly learned in the law that they write, handling with high sincerity and high seriousness the history of constitutional law to illustrate, support, and make to prevail, their political and economic convictions. It could not be, should not be, otherwise. But the fact

[65] 9 How., 603 (1850).
[66] 16 How., 164 (1853).
[67] 182 U. S., pp. 286–7.

must be recognized. We are not in a world where legal precedent, formal logic, and academic considerations control.

We recur to the bearings of these cases upon the subject of our essay. One point is determined: that the treaty-making power can be exercised to acquire territory.[68] The *decision* goes no further with respect to the interpretation of the treaty-making power. But Mr. Justice White in his concurring opinion in Downes *vs.* Bidwell does express himself as follows:

"It seems to me impossible to conceive that the treaty-making power by a mere cession can incorporate an alien people into the United States without the express or implied approval of Congress. . . . If the treaty-making power can absolutely, without the consent of Congress, incorporate territory, and if that power may not insert conditions against incorporation, it must follow that the treaty-making power is endowed by the Constitution with the most unlimited right, susceptible of destroying every other provision of the Constitution; that is, it may wreck our institutions."[69]

It should be observed of these remarks: first, that in the treaty under discussion it was expressly provided that Congress should determine the civil rights and political status of the inhabitants and that consequently the situation discussed by Mr. Justice White was not presented in the case before him; second, that four justices disagreed positively with this view,[70] one, Mr. Justice Brown, impliedly,[71] and one, Mr. Justice Gray, did not express himself. It should be further pointed out that in using the word "incorporate" Mr. Justice White used it in a special sense: that is, as equivalent

[68] In Wilson *vs.* Shaw, 204 U. S., 24 (1907), it is said: "It is too late in the history of the United States to question the right of acquiring territory by treaty," p. 32.

[69] 182 U. S., pp. 312–3.

[70] It might perhaps be superfically thought that since in the case at bar the ratification by Congress of the action of the treaty-making power was complete, the four dissenting judges could not necessarily be said to have differed with Mr. Justice White on the point in question. But since they admitted that the treaty was valid, and held that on *its ratification by the Senate,* the Constitution, and especially Art. 1, Sec. 8, was *ipso facto* extended to Porto Rico, it follows that this position was irreconcilably opposed to the views of Mr. Justice White.

[71] Such is the implication from the position of Mr. Justice Brown in DeLima *vs.* Bidwell, where he held that Porto Rico became by the treaty domestic territory.

to creating the territory acquired such part of the United States that all the provisions of the Constitution became *ipso facto* applicable. The right to acquire the territory was assumed: Mr. Justice White maintained that it was for Congress to determine its status and that of its inhabitants when so acquired, and that the treaty-making power had no such power.

It is submitted that too much emphasis should not be given to the language of Mr. Justice White. The circumstances under which he wrote do not require it—indeed, they rather militate against the binding force of his words. His argument that the exercise of the power "may wreck our institutions," simply states his political preference that a majority of each House of Congress shall have this power rather than the President and two-thirds of the Senate. There is, however, this forceful consideration back of Mr. Justice White's words, that it is not the function of the treaty-making power to legislate concerning the internal workings of government; and if "incorporation" were pushed to its fullest meaning, it might well be that the treaty-making power would exceed its functional offices if by the language of a treaty, it attempted, *propriore vigore,* to create a State. Certainly, if the treaty-making power should covenant that a State shall forthwith be carved out of a new territory acquired by treaty, such undertaking would have the force, neither more nor less, of a covenant to pay money. The contract might or might not be performed by Congress. The history of the exercise of the treaty-making power shows, however, as Mr. Justice White points out, that it has always been solicitous to reserve for the subsequent decision and action of Congress any and all questions of internal governmental legislation. The exigencies of party government and a proper regard for the dignity of the nation, would seem to unite in preventing the problem discussed from ever arising in the actual future history of the United States.

In one form, however, these very exigencies of property government have manifested themselves and created a precedent with respect to the acquisition of territory by the United States. When the question of the annexation of Texas was a subject of violent political controversy, a treaty was signed on April 12th, 1844, pro-

viding for its annexation. In the Senate were many irreconcilable opponents of the extension of slavery to which they believed this treaty would conduce, and on June 8th, it was rejected by a vote of 35 to 16.[72] After the presidential election favorable to annexation, a joint resolution was introduced, which, after a long and bitter debate, passed in both houses of Congress by a narrow majority.[73] Almost every possible view of the constitutional problems involved were taken by members of Congress in debate: it was said that a treaty was equivalent to a declaration of war on Mexico and unconstitutional, and that the joint resolution lacked any semblance of constitutional sanction, being really a negotiation with a foreign nation. The truth was and is, that annexation was deemed by the pro-slavery party, to be a vitally necessary measure, and they accomplished it in the only way they could, lacking as they did a two-thirds majority in the Senate, where the vote they mustered was 27 to 25.[74] Even this majority was obtained, as Dr. von Holst has conclusively shown, by attaching an amendment to the joint resolution authorizing the President to proceed by treaty, accompanied by representations that the President would adopt this alternative. But rapidly developing political conditions necessitated haste, and the promises on which a majority of senatorial votes had been secured, were disregarded.[75]

This precedent was followed in the annexation of Hawaii. Numerous treaties had been negotiated which had failed of ratification, and finally a joint resolution, reciting the assent of Hawaii by a treaty signed by both parties, but not ratified by the Senate, was passed by both Houses of Congress. Precisely two-thirds of the Senators present voted for the resolution but from the debates it would appear that a ratification of the treaty by the Senate could not have been secured.[76] It may therefore be accepted as politically

[72] *Congressional Globe,* Vol. 12, p. 698.

[73] Ibid., Vol. 14, p. 362 in Senate, p. 372 in House.

[74] See note 6.

[75] "Constitutional History of the United States," 1826–1896, Chap. VII.; 1846–1850, Chap. III.

[76] *Congressional Record,* Vol. 31, Part VII. Vote in Senate taken July 6, 1898, p. 6712.

determined constitutional law that acquisition of territory may be secured by act of Congress as well as by treaty. And in the case of Hawaii *vs.* Mankichi[77] the method adopted in the acquisition of Hawaii received express recognition and implied sanction by the Supreme Court. "The Treaty," said Mr. Justice Harlan, "was not formally ratified, but its object was accomplished by the passage of the Joint Resolution of July 7, 1898."[78]

The right of the treaty-making power to *cede* territory of the United States has been the subject of academic discussion, and in a few instances of judicial *dicta*. In Fort Leavenworth R. R. Co. *vs.* Lowe,[79] Mr. Justice Field, delivering the opinion of the Court, said as follows:

"The jurisdiction of the United States extends over all the territory within the States, and, therefore, their authority must be obtained, as well as that of the State within which the teritory is situated, before any cession of sovereignty or political jurisdiction can be made to a foreign country. And so when questions arose as to the northeastern boundary, in Maine, between Great Britain and the United States, and negotiations were in progress for a treaty to settle the boundary, it was deemed necessary on the part of our government to secure the co-operation and concurrence of Maine, so far as such settlement might involve a cession of her sovereignty and jurisdiction as well as title to territory claimed by her, and of Massachusetts, so far as it might involve a cession of title to lands held by her."[80]

The point at issue in the case was whether the legislature of the State might cede its jurisdiction to the United States, and the opinion of the Court is to the effect that the right to cede to the general government was governed by wholly different considerations from the right to cede, if any existed, to a foreign nation. In Geofroy *vs.* Riggs,[81] the Court took occasion to remark:

"The treaty-making power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent."[82]

[77] 190 U. S., 197 (1903).
[78] 190 U. S., p. 228.
[79] 114 U. S., 525 (1885).
[80] 114 U. S., pp. 540–1.
[81] 133 U. S., 258 (1890).
[82] 133 U. S., p. 267.

In Downes *vs.* Bidwell,[83] which case we have already fully considered, Mr. Justice White reviewed at considerable length the argument that territory might be ceded by the treaty-making power. He showed that Jefferson absolutely denied this right, and concluded:

"True, from the exigency of a calamitous war or the necessity of a settlement of boundaries, it may be that citizens of the United States may be expatriated by the action of the treaty-making power, impliedly or expressly ratified by Congress. But the arising of these particular conditions cannot justify the general proposition that territory which is an integral part of the United States may, as a mere act of sale, be disposed of."[84]

This question of the right of the treaty-making power to cede territory is wholly a political question, and when, if ever, it arises for determination, it will necessarily be determined upon wholly political considerations. If it be found necessary or advisable for the United States government to cede territory, the manner of the ceding will be immaterial. Whatever the National government does as a government will, it is apprehended, be recognized by the Supreme Court as a political act, and as a thing accomplished.

After the absolute prohibition contained in the first clause of Article I., Section 10, of the Constitution to the effect that no State shall enter into any treaty, the second clause forbids a State, *inter alia,* from entering into any agreement or compact with another State, or with a foreign power, without the consent of Congress. The meaning of this second clause is the subject of some academic interest. The difficulty is that an "agreement or compact with a foreign power" is a precise and accurate definition of a treaty, and the making of any treaty, with or without the consent of Congress, is forbidden to any State. In the absence of any judicial interpretation of this clause, the following explanation is submitted. There are two clauses on the subject because the Articles of Confederation had two, and the applicable text therein contained was the basis of the draft of the Constitution. There were two clauses in the Articles of Confederation because the first was concerned with treaties with foreign powers by the United States, and the second was concerned

[83] 182 U. S., 244 (1901).

[84] 182 U. S., p. 317.

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with treaties among the States. When the committee of detail drafted their report, they retained the second clause because they desired to regulate adjustments between States. Accordingly, they used the words "agreement or compact" in lieu of "treaty, confederation, or alliance" because these sovereign acts were by the first clause absolutely denied to the States. The committee left in existence the power of the States to make arrangements and adjustments having no political significance, but, to guard against any abuse, required the consent of Congress. It was not unnatural that some draftsman added to the words "with another State," the phrase "or with a foreign power." They remain, however, redundant.

The decisions upon the force and effect of this second clause are strictly not relevant to the subject of this essay since they involve only the mutual relations of the States. In the thought, however, that they may serve to give a more complete understanding of the constitutional clauses under discussion, their significance may be briefly indicated. In Green *vs.* Biddle,[85] the validity of a compact made between Virginia and Kentucky came before the Supreme Court, and was sustained on the ground that it had been recognized by Congress. In Poole *vs.* Fleeger,[86] a compact between North Carolina and Tennessee was likewise sustained. In the more recent case of Virginia *vs.* Tennessee[87] the second clause of Article I., Section 10, of the Constitution, so far as it relates to agreements or compacts between States, receives an exhaustive examination and interpretation. It was held that the consent of Congress would be essential, "according as the establishment of the boundary line may lead or not to the increase of the political power or influence of the States affected, and thus encroach or not upon the full and free exercise of Federal authority."[88] In the case before the court, the consent of Congress was said to have been by implied ratification. In Wharton *vs.* Wise,[89] and in Stearns *vs.* Minnesota[90] the principles of construction enunciated in Virginia *vs.* Tennessee were again carefully examined, and applied.

[85] 8 Wheat., 1 (1823).
[86] 11 Peters, 185 (1837).
[87] 148 U. S., 503 (1893).
[88] 148 U. S., p. 520.
[89] 153 U. S., 155 (1894).
[90] 179 U. S., 223 (1900).

The question of the applicability to the treaty-making power of the first eight amendments to the Constitution (appended hereto as note 7) is one which should in this connection be considered. An examination of the Insular Cases will show that the question of the applicability of these amendments and of the other constitutional restrictions on State action, to the new possessions of the United States, revealed considerable divergence in opinion among the justices who decided these cases. Before these decisions it had been held that the amendments (the sixth and seventh were particularly in controversy) controlled the action of the United States in the District of Columbia, in the Indian Territory, and in the Territories generally.[91] After, however, Porto Rico, Hawaii, and the Philippines had been acquired, although the prior cases have been approved, a disposition has been manifested to apply a different principle toward determining the applicability of the constitutional restraints on Federal action. In Hawaii *vs.* Mankichi[92] the appellee had been convicted of manslaughter on an indictment not found by a grand jury, and by a vote of a petit jury of 9 to 3. This had been the usual course of procedure in Hawaii prior to annexation. The joint resolution of Congress had provided:

> "The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine."

It was held that this resolution failed to state the *intention* of Congress, which could not have been, said the court, "to interfere with the existing practice when such interference would result in imperilling the peace and good order of the islands."[93] Mr. Justice White and Mr. Justice McKenna added their conviction that the constitutional provisions could not apply *in toto* upon annexation, but that the language of the congressional resolution "clearly

[91] Callan *vs.* Wilson, 127 U. S., 540 (1888), Cook *vs.* United States, 138 U. S., 157 (1891), American Publishing Company *vs.* Fisher, 166 U. S., 464 (1897), Thompson *vs.* Utah, 170 U. S., 343 (1898).

[92] 190 U. S., 197 (1903).

[93] 190 U. S., p. 214.

referred only to the provisions of the Constitution which were applicable and not to those which were inapplicable."[94] The Chief Justice and Justices Harlan, Brewer, and Peckham dissented. Said Mr. Justice Harlan in a learned and earnest opinion:

[The principle underlying the decision of the majority of the Court] "would place Congress above the Constitution. It would mean that the benefit of the constitutional provisions designed for the protection of life and liberty may be claimed by some of the people subject to the authority and jurisdiction of the United States, but cannot be claimed by others equally subject to its authority and jurisdiction. . . . It would mean that, if the principles now announced should become firmly established, the time may not be far distant when, under the exactions of trade and commerce, and to gratify an ambition to become the dominant political power in all the earth, the United States will acquire territories in every direction, which are inhabited by human beings, over which territories, to be called 'dependencies' or 'outlying possessions,' we will exercise absolute dominion, and whose inhabitants will be regarded as 'subjects' or 'dependent peoples,' to be controlled as Congress may see fit, not as the Constitution requires, nor as the people governed may wish. Thus will be engrafted upon our republican institutions, controlled by the supreme law of a written constitution, a colonial system entirely foreign to the genius of our Government and abhorrent to the principles that underlie and pervade the Constitution. It will then come about that we will have two governments over the peoples subject to the jurisdiction of the United States, one existing under a written Constitution, creating a government with authority to exercise only powers expressly granted and such as are necessary and appropriate to carry into effect those so granted; the other, existing outside of the written Constitution, in virtue of an unwritten law to be declared from time to time by Congress, which is itself only a creature of that instrument."[95]

In Dorr *vs.* United States,[96] the decision in Hawaii *vs.* Mankichi is approved and followed.[97] The court lays down the following principle as controlling:

"Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision that the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation."[98]

[94] 190 U. S., p. 221.

[95] 190 U. S., pp. 238–40.

[96] 195 U. S., 138 (1904).

[97] See also the case of Rassmussen *vs.* United States, 197 U. S., 516 (1905), wherein the constitutional provisions were declared to be applicable to Alaska.

[98] 195 U. S., p. 143.

These decisions certainly find their sanction in political rather than in historical considerations. The question of the government of essentially colonial territory is a *political* not a *legal* question. The Supreme Court of the United States have therefore declared Congress to be the power which must judge and determine the applicability of constitutional provisions. Wise such action may be politically; but logically analyzed, to do this is to put Congress, the creature of the Constitution, above the Constitution.

The relation between the foregoing decisions and the applicability of the first eight amendments to the treaty-making power is not immediate. Yet, it will be readily concluded that if territory may be acquired by the treaty-making power without subjecting the government of that territory to constitutional provisions except by the action of Congress, such provisions can hardly be said to restrain the treaty-making power. The case of In re Ross[99] is of interest to us here. Therein, an English subject serving as a seaman on an American vessels, was tried for murder before a consular court sitting in Japan under the provisions of a treaty with that country, and was convicted. The trial was not in accordance with constitutional requirements. The Supreme Court held that since he was an American seaman, his nationality was immaterial, and that the Constitution was not ordained for countries outside the United States and could have no operation in another country. Said the Court:

> "The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein. . . .
>
> "The framers of the Constitution, who were fully aware of the necessity of having judicial authority exercised by our Consuls in non-christian countries, if commercial intercourse was to be had with their people, never could have supposed that all the guarantees in the administration of the law upon criminals at home were to be transferred to such consular establishments, and applied before an American who had committed a felony there could be accused and tried."[100]

[99] 140 U. S., 453 (1891).

[100] 140 U. S., pp. 463–5.

It is also interesting to note in this connection that rights to administer the estates of aliens dying here, have been by certain treaties granted by the United States to foreign consuls. No cases arising from these treaty provisions have reached the Federal courts, but they have been the subject of State recognition.[101]

Having regard to the decisions following the "Insular Cases," and bearing in mind the essential political and national character of the problems involved, it may be fairly concluded that when the question arises whether treaty provisions are subject to the constitutional restrictions on Federal action contained in the body of the Constitution and in the first eight amendments, the Supreme Court will judge of each case according to what it has called "the applicability" of the provision in question. And it may not be amiss to add that political considerations will be as potent as legal in determining that "applicability."

II.

The first question presented, as we have seen, when one examines into the fundamental nature of the treaty-making power is: When a treaty deals with a subject upon which Congress is authorized to legislate, is such treaty valid? or perhaps we should rather ask, what is its status?

There is an anomaly in the treaty-making power of the United States created by the Constitution which we must at this juncture consider. A treaty is, primarily, and with most nations solely, a contract with another sovereignty. In the United States, however, by the provisions of the Constitution it may have the force of a legislative enactment. In Article VI. it is provided:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the

[101] On this point, see Matter of Lombrasciano, 77 N. Y. Supp., 1040 (1902), Matter of Fattosini, 67 N. Y. Supp., 1119 (1900), *In re* Wyman, 191 Mass., 276 (1906), Roca *vs.* Thompson, 157 Cal., 552 (1910). An appeal from this last case is pending in the Supreme Court of the United States. It would seem that it should be reversed, unless the interpretation given to the Italian treaty requires a different decision.

land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

This language is unique in the efficacy it would seem to give to provisions in treaties made under the authority of the United States, and its bearing is important on the question under discussion: namely, the status of treaties made respecting subjects committed to Congress for legislation. It is apparent that the courts are contemplated as the forum wherein the treaties are to be recognized as the supreme law of the land. It is apparent likewise that it is *individual* rights secured by treaties which the courts are to be open to enforce. With *political* questions arising under treaties, the judiciary could have nothing to do. Thus, this clause of the Constitution is not applicable to the problem of the necessity of congressional action when an appropriation is essential to make payment for territory purchased under treaty. The judiciary could not assume to force action by Congress, nor to usurp its functions. Neither is the clause applicable with respect to the acquisition or cession of territory. These national questions are political, and are not properly for the judiciary.

We turn therefore away from the examination of these solely political problems to that of individual rights—though political considerations will still intrude themselves. The true line of approach is through the proper interpretation and application of Article VI. of the Constitution. Professor Mikell is very clear and precise in his view of the meaning and effect of this article.

"So far," he says, "as the domestic or intraterritorial effect of the exercise of any of the powers committed by the Constitution to Congress are concerned, Congress alone has any power in the premises. But Congress has no power to treat with foreign nations, hence when any of these powers vested in Congress are to be exercised in agreement with a foreign power, the *agreement* with such foreign nation must first be completed by the treaty-making power, but this *agreement,* though it is a treaty in the meaning of that word as used in international law, is not a treaty in the sense intended by the Constitution when it says a treaty is the supreme law of the land. To be that it must be sanctioned by an act of Congress."[102]

[102] "The Extent of the Treaty-making Power of the President and Senate of the United States," by William E. Mikell, *U. of P. Law Review* and *American Law Register,* Vol. 57, p. 456.

Again, this same position is more conservatively suggested by another essayist who says, speaking of the Supreme Court of the United States:

"It is still open for that Court to hold that no treaty dealing with matters entrusted to Congress is self-executing."[103]

If such statement be accurate, it is not because the Supreme Court has failed to discuss the question. In a series of cases about to be considered, the interpretation and application of Article VI. of the Constitution were flatly before the court. This analysis should determine the openness of the question whether or not treaties have the force of law when dealing with subjects committed to Congress.

Before entering upon this analysis, however, it may be well to record a contemporary interpretation of this clause which has come down to us. George Mason was a member of the Federal Convention from Virginia and was one of those who declined to sign the Constitution. He issued a short pamphlet giving his objections to that instrument, among which he included the operation of the treaty-making power. On this point he said:

"By declaring all treaties supreme laws of the land, the Executive and the Senate have, in many cases, an exclusive power of legislation; which might have been avoided by proper distinctions with respect to treaties, and requiring the assent of the House of Representatives, where it could be done with safety."[104]

Mason was a Virginian of distinction and earnestly opposed the ratification of the Constitution by his State. He spoke frequently in the Virginia Convention, and neither in his speeches nor anywhere else in those debates, nor in the debates in the Federal Convention, is there to be found a suggestion that Mason's interpretation of the clauses establishing the treaty-making power was not the interpretation of all.

United States *vs.* Schooner Peggy[105] seems to have been the

[103] "The Extent and Limitations of the Treaty-making Power under the Constitution," by Chandler P. Anderson, *American Journal of International Law*, Vol. I, Part II (1907), p. 654.

[104] Farrand, Vol. II., p. 639.

[105] 1 Cranch, 103 (1802).

earliest case in which the Supreme Court interpreted and applied the Sixth Article of the Constitution to an existing treaty. Therein, in accordance with the Act of Congress of July 9th, 1798, a decree of condemnation had been pronounced by the Circuit Court on September 23rd, 1800. On October 2nd, 1800, a writ of error was allowed to the Supreme Court. A treaty with France was signed September 30th, 1800. Mr. Chief Justice Marshall delivered the opinion of the Court, and held that the treaty operated at once *propriore vigore* to set aside the condemnation, which had not, while the writ of error was pending, become definitive within the meaning of the treaty. The Chief Justice said:

"The Constitution of the United States declares a treaty to be the supreme law of the land. Of consequence, its obligation on the Courts of the United States must be admitted. It is certainly true that the execution of a contract between nations is to be demanded from, and, in the general, superintended by, the executive of each nation; and, therefore, whatever the decision of this Court may be relative to the rights of parties litigating before it, the claim upon the nation, if unsatisfied, may still be asserted. But yet where a treaty is the law of the land, and as such affects the rights of parties litigating in Court, that treaty as much binds those rights, and is as much to be regarded by the Court, as an act of Congress."[106]

It will be observed that the Act of 1798 was passed by Congress in the exercise of either or both of its powers to declare war and to regulate commerce. The treaty with France therefore was declared by this case to operate as a repeal of an act upon a subject expressly committed to Congress.

In Foster & Elam *vs.* Neilson,[107] the question of the effect to be given a treaty provision under Article VI. of the Constitution came again before the Supreme Court. It was a case of great importance, argued by Mr. Webster, among others, and resulted in an unanimous decision delivered by Mr. Chief Justice Marshall. The arguments are reported at length, and the assumptions underlying them have also their significance. The action was one in the nature of ejectment seeking to recover lands lying east of the Mississippi in what was at one time known as West Florida. The defendant relied on want of title in the plaintiff. He had set up a title derived

[106] Ibid., p. 109.

[107] 2 Peters, 253 (1829).

from a grant by the King of Spain dated in 1804, subsequent to the treaty of cession of Louisiana. The first question at issue was the extent of the cession. It was claimed that this did not extend to what was called West Florida, and it was shown that this had long been a controverted point on which Spain, France, and the United States had disputed until adjusted by the treaty with Spain signed February 22, 1819. It was urged that this dispute should now be judicially determined. The Acts of Congress respecting this territory including West Florida are recited by the Chief Justice, who then disposes of this first issue in the following words:

"If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the Legislature has acted on the construction thus asserted, it is not in its own Courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question, and in its discussion, the Courts of every country must respect the pronounced will of the Legislature."[108]

The second point of controversy in this case was the effect to be given the treaty of 1819 above referred to. Did it or did it not, the Chief Justice proceeds to consider, operate to confirm all grants made by the King of Spain after the treaty of 1800 and prior to January 24th, 1818. The language of the treaty on this point was as follows:

"All the grants of land made before the 24th of January, 1818, by his Catholic Majesty, or by his lawful authorities, in the said territories ceded by his Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty."

Prior to the execution of this treaty, Congress had passed an act purporting to annul such grants, and after its execution by a series of acts it confirmed certain grants, among which was not, however, the plaintiff's. After quoting the extract from the treaty given above, the Chief Justice said:

"Do these words act directly on the grants, so as to give validity to those

[108] Ibid., p. 309.

not otherwise valid; or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?

"A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially so far as its operation is intra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

"In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in Courts of Justice as equivalent to an Act of the Legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

"The article under consideration does not declare that all the grants made by his Catholic Majesty before the 24th day of January, 1818, shall be valid to the same extent as if the ceded territories had remained under his dominion. It does not say that those grants are hereby confirmed. Had such been its language, it could have acted directly on the subject, and would have repealed those Acts of Congress which were repugnant to it; but its language is that the grants shall be ratified and confirmed to the persons in possession, etc. By whom shall they be ratified and confirmed? This seems to be the language of contract; and if it is, the ratification and confirmation which are promised must be the Act of the Legislature. Until such Act shall be passed, the Court is not at liberty to disregard the existing laws on the subject."[109]

A decree was therefore entered adverse to the title of the plaintiff.

This case constitutes, therefore, a decision, first, that treaties must, if properly worded to convey such intention, "be regarded in Courts of Justice as equivalent to an act of the Legislature"; secondly, that they may, however, "import a contract only"; thirdly, that in the case at bar, the language used required Congress to execute the contract by the passage of an act before it could become a rule for the Court. There is nothing of the nature of *obiter dicta* in the decision of the Court. The grounds of the decision are expressly stated. It is, moreover, worthy of note that in the arguments of counsel the interpretation given in the court's opinion to Article VI. of the Constitution is assumed by counsel—one of whom was Mr. Webster—to whose interest it would have been to argue that the treaty "must be sanctioned by an Act of Congress" to

[109] Ibid., pp. 314–5.

become "a treaty in the sense intended by the Constitution when it says a treaty is the supreme law of the land." No better opportunity to enunciate this doctrine could have been presented. By Act of March 26th, 1804, Congress had provided that all such grants for lands as constituted the plaintiff's title, "are hereby declared to be, and to have been from the beginning, null, void and of no effect in law or equity." And yet the Court said: Had the treaty provided "that those grants are hereby confirmed," "it would have acted directly on the subject, and would have repealed those Acts of Congress which were repugnant to it." The act was passed in 1804 presumably under Article IV., Section 3, of the Constitution: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." The treaty was made *fifteen years* thereafter, and yet the Court held that it could have operated, by a slight change in phraseology sufficient to show an intention that its provisions should operate forthwith, as a repeal of the acts of Congress upon a subject of law so local and individual in its nature as the subject of land titles. To say that this case went off on the interpretation of the treaty, is to deal with the shadow of things.

It is to do more; it is to ignore the authority and significance of the numerous other cases decided shortly thereafter with reference to this same Spanish treaty. In United States *vs.* Percheman,[110] a case similar to that of Foster & Elam *vs.* Neilson, it was brought to the attention of the Court, that in the Spanish original of the treaty, the language used was equivalent to a confirmation by force of the treaty itself. Said Mr. Chief Justice Marshall:

"When we observe that in the counterpart of the same treaty, executed at the same time by the same parties, they are used in this sense, we think the construction proper, if not unavoidable.

"In the case of Foster *vs.* Elam, 2 Peters, 253, this Court considered considered these words as importing contract. The Spanish part of the treaty was not then brought to our view, and we then supposed that there was no variance between them. We did not suppose that there was even a formal difference of expression in the same instrument, drawn up in the language of each party. Had this circumstance been known, we believe it would have produced the construction which we now give to the article.

[110] 7 Peters, 51 (1833).

"This understanding of the article, must enter into our construction of the acts of Congress on the subject."[111]

After the death of Marshall in 1835, there followed a series of cases concerning these Spanish grants, in which was discussed the case of Foster & Elam *vs.* Neilson. The important ones are Strother *vs.* Lucas,[112] Garcia *vs.* Lee,[113] and Pollard *vs.* Kibbe.[114] Differences of opinion developed among the judges but each of them in explicit language adopted and approved the doctrine of Foster & Elam *vs.* Neilson that a treaty when made self-executing by its terms has the force of a legislative act. Thus in Garcia *vs.* Lee, Mr. Chief Justice Taney in delivering the opinion of the Court, unanimous upon this point,[115] said:

"If, therefore, this was a new question and had not already been decided in this Court; we should be prepared now to adopt all of the principles affirmed in Foster & Elam *vs.* Neilson, with the exception of the one since over-ruled in the case of the United States *vs.* Percheman, as hereinbefore stated."[116]

In arguing Foster & Elam *vs.* Neilson, it had been said:

"The plaintiffs invoke the aid of treaties. They place their claim upon the language of treaties which the Constitution has made the law of the land, and which cannot be annulled by the executive, or by the legislature."[117]

Apparently, therefore, doubt existed generally as to whether Congress by the passage of an act could in effect repeal the provisions of a treaty as operative local law.[118] The question was brought squarely before Mr. Justice Curtis sitting at circuit in 1855 in

[111] Ibid., p. 89.

[112] 12 Peters, 410 (1838).

[113] Ibid., 511 (1838).

[114] 14 Peters, 353 (1840).

[115] The single dissent of Mr. Justice Baldwin, as is apparent from his long opinion in Pollard *vs.* Kibbe, was based on the fact that he thought the interpretation put upon the treaty in United States *vs.* Percheman should be followed out further than the remaining members of the Court had determined in Garcia *vs.* Lee.

[116] 12 Peters, p. 522.

[117] 2 Peters, p. 277.

[118] Writing in *The Federalist*, Jay had said: "The proposed Constitution has not in the least extended the obligation of treaties. They are just as binding and just as far beyond the lawful reach of legislative acts now as they will be at any future period or under any form of government."

Taylor *vs.* Morton.[119] Congress had passed a customs act alleged to be in contravention of an existing treaty with Russia; and the judge held that it was wholly immaterial to inquire whether the statute departed from the treaty, inasmuch as it was the prerogative of Congress to determine whether a treaty should be kept or abrogated, and that the will of Congress expressed in a statute was obligatory on the judiciary, whether the departure from the treaty was accidental or designed, or the reasons therefor, if designed, were good or bad.

This question reached the Supreme Court in 1870 in the case of The Cherokee Tobacco,[120] wherein an act of Congress was in conflict with the existing treaty with the Cherokee nation. Said the Court:

> "Undoubtedly one or the other must yield. The repugnancy is clear and they cannot stand together. . . . The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior Act of Congress (Foster & Elam *vs.* Neilson is here quoted in the margin), and an Act of Congress may supersede a prior treaty (Taylor *vs.* Morton is here quoted in the margin). In the cases referred to these principles were applied to treaties with foreign nations."[121]

The Court therefore held that they applied equally to treaties with Indian tribes, and that the statute must prevail over the provisions of an earlier treaty. There are several interesting points to note here. The first is that Foster & Elam *vs.* Neilson is quoted as establishing the principle that "a treaty may supersede a prior act of Congress." Surely if it may do that, it is not necessary in order that it should become effective as a law of the land that it "be sanctioned by an act of Congress." In the case under discussion, the Act of Congress was passed under the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." There had been an effective treaty regulating commerce. Was it invalid as it dealt with a subject expressly committed to Congress? Such an idea never entered the minds of the Court. In truth, while constitutional interpretation was forming

[119] 2 Curtis, 454 (1855).
[120] 11 Wall., 616 (1870).
[121] 11 Wall, pp. 620–1.

into that body we now know as constitutional law, the recognition of treaties as embodying the supreme law of the land is seen as universal. The assumption of this principle of interpretation underlies every argument, every decision, every reason enunciated as the ground of decision. The query in some minds, as for example, those of counsel in Foster & Elam *vs.* Neilson quoted above, was quite different. They questioned the *effectiveness* of an act of Congress in conflict with a prior treaty.

Following The Cherokee Tobacco case came The Head Money Cases;[123] and the question therein was whether an act of Congress was valid which imposed on ship owners a small tax for each immigrant brought into the United States, and provided that the proceeds should be used for the benefit of immigrants as a class. The Court remarked:

"We had supposed that the question here raised was set at rest in this Court by the decision in The Cherokee Tobacco."[124]

And the Court held:

"We are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the Courts of this Country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal."[124]

On the subject of the status of treaties under the Constitution, the Court lays down the following controlling principles:

"A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this, the judicial Courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the Courts of the country. . . . A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And

[123] 112 U. S., 584 (1884).
[124] Ibid., p. 597.
[124] Ibid., p. 599.

when such rights are of a nature to be enforced in a Court of justice, that Court resorts to the treaty for a rule of decision for the case before it as it would to a statute."[125]

To say, in a case where the Act of Congress under discussion was sustained as a regulation of commerce, that "a treaty is a law of the land as an act of Congress is," is flatly inconsistent with the doctrine that a treaty must to receive recognition "be sanctioned by an act of Congress." And the opinion quoted was that of Mr. Justice Miller acquiesced in by the whole Court.

The case of United States *vs.* 43 Gallons of Whiskey[126] has been passed over for the moment. Therein the question was as to the effect of a treaty with the Chippewa Indians proclaimed May 5, 1864. By Article VII. thereof, it was provided that the laws of the United States respecting the sale of liquors in the Indian country should be in full force throughout the country thereby ceded. This ceded territory had become part of the State of Minnesota. The Court sustained the efficacy of the provisions in the treaty and said:

"The Constitution declares a treaty to be the supreme law of the land; and Chief-Justice Marshall, in Foster & Elam *vs.* Neilson, has said, 'that a treaty is to be regarded, in Courts of justice, as equivalent to an Act of the Legislature, whenever it operates of itself, without the aid of any legislative provision.' No legislation is required to put the Seventh Article in force; and it must become a rule of action, if the contracting parties had power to incorporate it in the treaty of 1863. About this there would seem to be no doubt."[127]

This is another case where a united court concurred in Mr. Chief Justice Marshall's view respecting the meaning of Article VI. of the Constitution and the consequent efficacy of treaty provisions even when not "sanctioned by an Act of Congress."

It will be best to consider together the Chinese Exclusion Cases, and therefore the case of United States *vs.* Rauscher[128] next deserves attention. It arose under the provisions of an extradition treaty and decides that under its proper construction a person demanded and received from Great Britain in accordance with its provision, cannot be tried for a crime other than the one for which he was extradited. In the course of the opinion the language of

[125] Ibid., pp. 598–9.
[126] 93 U. S., 188 (1876).
[127] Ibid., p. 196.
[128] 119 U. S., 407 (1886).

Mr. Chief Justice Marshall in Foster & Elam *vs.* Neilson and of Mr. Justice Miller, already quoted above, is unanimously approved and set forth in full.[129]

The cases of Bartram *vs.* Robertson[130] and Whitney *vs.* Robertson[131] will be next considered. These grew out of a treaty made January 30th, 1875, with the King of the Hawaiian Islands providing for the importation free of duty into the United States of certain produce of these islands. It was held in the former case that the existing treaty with Denmark, and in the latter case that the existing treaty with the Dominican Republic, did not by the provisions therein contained against discrimination in favor of products of other countries, operate to cause the existing tariff to be lowered in favor of those nations. The ground given in Bartram *vs.* Robertson for this decision was that the treaty stipulations relied on, "even if conceded to be self-executing by the way of a proviso or exception to the general law imposing the duties, do not cover concessions like those made to the Hawaiian Islands for a valuable consideration." In Whitney *vs.* Robertson the former case is quoted with approval, and the same ground is given for the decision. The Court then proceeds to state as a second controlling consideration the fact that the Act of Congress under which the duties were collected on importations from San Domingo, was subsequent in date to the treaty. On this point the Court quoted with approval Taylor *vs.* Morton, and Head Money Cases, and said:

> "If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether. By the Constitution a treaty is placed on the same footing, and made of like obligation, with an Act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other."[132]

This is the language of Mr. Justice Field speaking for a united Court in a case involving the comparative efficacy of treaty provisions and an Act of Congress respecting *duties*. Can it be said

[129] Ibid., pp. 418–9.
[130] 122 U. S., 116 (1887).
[131] 124 U. S., 190 (1888).
[132] Ibid., p. 194.

that the Court which decided this case, thought it open to them to hold that no treaty on this subject *could* be self-executing? To so suggest is to make nonsense of the language quoted: "By the Constitution a treaty is . . . made of like obligation with an Act of legislation." The judge is speaking of treaties and acts respecting duties on foreign commerce. Is it possible to maintain that the Court thought that a treaty made self-executing in its terms had no efficacy in a case respecting duties?

The Chinese Exclusion Cases had popular interest and political significance. Necessarily, the ability of the counsel who argued them was high; all that could be said was presumably said in arguing this long succession of cases before the Supreme Court. Yet nowhere creeps in a suggestion that the provisions of the treaties with China dealing with and regulating commerce and immigration, are ineffective as laws; indeed, the cases are suffused with the light of the contrary assumption and constitute direct and positive decisions recognizing and establishing the efficacy of treaty provisions *propriore vigore.*

In 1881, a treaty with China was ratified looking to the regulation by the United States of the immigration of Chinese laborers. In 1882 Congress passed a regulating Act, and in 1884 a supplementary Act under which it required of Chinese about temporarily to leave, to secure a certificate which should be the only evidence permissible to establish a right of reëntry. Afterwards, in 1888, Congress passed an Act absolutely forbidding the return to the United States of any Chinese who had departed or who should depart. In 1884, in the case of Chew Heong *vs.* United States,[188] the Court held that the Act of 1884 should not be interpreted to bar out Chinese who had left the country before the Act, and therefore could not be in possession of the required certificate. The chief ground of this decision was that the treaty and the Act had the same authority and should therefore, if possible, be so construed as to be mutually consistent; so as to avoid the necessary alternative of holding that the later law repealed by implication the treaty.

"A treaty," said the Court, "that operates of itself without the

[188] 112 U. S., 536 (1884).

aid of legislation is equivalent to an Act of Congress, and while in force constitutes a part of the Supreme power of the land. Foster *vs.* Neilson."[184] Mr. Justice Field dissented on the ground that the act was too plain to permit of any interpretation consistent with the treaty. As to the principle regulating the subject, he said:

"A treaty is in its nature a contract between two or more nations, and is so considered by the writers on public law; and by the Constitution it is placed on the same footing and made of like obligation as a law of the United States. Both are declared in that instrument to be the supreme law of the land, and no paramount authority is given to either over the other.

"Some treaties operate in whole or in part by their own force, and some require legislation to carry their stipulations into effect. . . . If the treaty relates to a subject within the power of Congress and operates by its own force, it can only be regarded by the Courts as equivalent to a legislative act. Congress may, as with an ordinary statute, modify its provisions, or supersede them altogether."[185]

Here is language directly contrary to the modern essayist's idea of the openness of the question whether a treaty may deal with a subject committed to Congress. "*If,*" says Mr. Justice Field, and on that point the whole Court concurred, "*the treaty relates to a subject within the power of Congress and operates by its own force, it can only be regarded by the courts as equivalent to a legislative act.*"

After Congress had, in 1888, as above stated, unqualifiedly legislated against the return of Chinese laborers who had once left this country, the Supreme Court in Chae Chan Ping *vs.* United States,[186] sustained the constitutionality of this statute. Mr. Justice Field delivered the opinion of the Court, and said:

"It must be conceded that the Act of 1888 is in contravention of express stipulations of the treaty of 1868 and of the supplemental treaty of 1880, but it is not on that account invalid or to be restricted in its enforcement. The treaties were of no greater legal obligation than the Act of Congress. By the Constitution, laws made in pursuance and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. . . . If the treaty operates by its own force, and relates to a subject within the powers of Congress, it can be deemed in that particular only the equivalent of a legislative Act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control."[187]

[184] Ibid., p. 540.
[185] Ibid., pp. 562–3.
[186] 130 U. S., 581 (1889).
[187] Ibid., p. 600.

These Chinese Exclusion Cases are followed by innumerable others dealing with one aspect or another of the treaties and the statutes concerning the subject. Every decision approves the cases analyzed above, and, inwoven with the reasoning on which they are based, appears the reiteration of the equal efficacy of treaty provision and statute law upon a subject within the power of Congress. The proposition that a treaty provision has no force until "sanctioned by an act of Congress" would have met with impatient astonishment if uttered to the judges who decided these cases.

In Geofroy *vs.* Riggs[138] there is a most interesting and positive holding that a treaty may operate of its own force to repeal an act of Congress. The question presented was, in the language of the Court: "Can citizens of France take land in the District of Columbia by descent from citizens of the United States?" On February 27th, 1801, by Act of Congress it was provided "that the laws of the State of Maryland as they now exist shall be and continue in force in that part of the said District which was ceded by that State to the United States and by them accepted." After examining the law of Maryland at that date, the Supreme Court held that it established the disability of aliens to inherit. But, said the Supreme Court, the treaty with France of 1853 provided that the President shall recommend to the several States the passage of acts conferring the right of holding real estate upon Frenchmen; the word "States" must have been used as equivalent to political communities; since there could be no plausible motive for discrimination between the States, on the one hand, and the District of Columbia and the Territories, on the other, the intention of the treaty must have been to give French citizens the right of acquiring real estate by descent. Accordingly, the right of the French claimants was sustained. The Act of 1801 was passed by Congress in pursuance of its constitutional power "to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States."[139] Yet the decision of this case is indisputably

[138] 133 U. S., 258 (1889).
[139] Article I., Sec. 7.

and unqualifiedly that the treaty operated of its own force to supersede the Act of Congress.

In Nishimura Ekiu *vs.* United States,[140] the constitutionality of an Act of Congress forbidding certain classes of aliens to land, was challenged, but was sustained. The Court in its opinion recognized the adequacy of the treaty-making power to deal with the subject.

> "It belongs," the Court said, "to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through Statutes enacted by Congress, upon whom the Constitution has conferred power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States."[141]

The case of United States *vs.* Lee Yen Tai[142] arose out of the treaty with China of 1894, and the contention was made that that treaty repealed or superseded the existing Acts of Congress. The Court recited with approval the authorities analyzed above, and held that the purpose to abrogate a treaty by a statute must clearly appear, that in the case at bar the statute and treaty were "in absolute harmony" and consequently that interpretation was certified to the lower court.[143] Is it possible for one moment to maintain that this decision is consistent with the thought that the treaty could *not* have superseded the prior acts? The Court say: first, if the treaty be inconsistent with the continued existence of the acts, they are to be regarded as repealed; second, there is no inconsistency. The first proposition is as absolutely a decision of the Court as the latter. Again, in the very recent case of Johnson *vs.* Browne,[144] we have again the question presented of whether a treaty has operated to repeal a prior statute. The decision was to the effect that they were readily reconcilable. It was a case of extradition, but there is no hint of distinction upon this ground.

In DeLima *vs.* Bidwell, in the opinion reported as that of the Court, we have an emphatic modern reiteration and approval of the authorities just analyzed. After quoting from the constitutional provision, the Court say:

> "It will be observed that no distinction is made as to the question of

[140] 142 U. S., 651 (1892).
[141] Ibid., p. 659.
[142] 185 U. S., 213 (1902).
[144] 205 U. S., 309 (1907).

supremacy between laws and treaties, except that both are controlled by the Constitution. A law requires the assent of both houses of Congress, and, except in certain specified cases, the signature of the President. A treaty is negotiated and made by the President, with the concurrence of two thirds of the Senators present, but each of them is the supreme law of the land."[145]

The authorities are then quoted with approval.[146]

In Fok Yung Yo *vs.* United States,[147] the treaty of 1894 with China, under consideration in United States *vs.* Lee Yen Tai, came again before the United States Supreme Court. By Article 3 it was "agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent such privilege of transit from being abused." On December 8th, 1900, the Secretary of the Treasury, acting under this treaty, issued regulations to the collectors of customs. A collector, acting under these regulations, refused to permit the plaintiff to land. His action was sustained by the Supreme Court, who recited the paragraph of the treaty quoted above and said:

"We regard this as explicitly recognizing existing regulations, and as assenting to their continuance, and to such modification of them as might be found necessary to prevent abuse. It dealt with the subject specifically, and was operative without an Act of Congress to carry it into effect."[148]

This is certainly a decision that a provision in a treaty leaving it to the executive to regulate commerce in certain particulars, is valid without an act of Congress, and that regulations made under it are enforceable.

Inasmuch as the Supreme Court has spoken so often, so uniformly, so positively, upon the question discussed in the preceding cases, it would seem almost a work of supererogation to inquire how many treaties have been made regulating commerce, and put into effect without any act of Congress. In Baldwin *vs.* Franks,[149] decided in 1887, Mr. Justice Fields recited a list. There are, he said,

"clauses found in some treaties with foreign nations, stipulating that the subjects or citizens of those nations may trade with the United States, and,

[145] 182 U. S., p. 195.
[146] See note 9.
[147] 185 U. S., 296 (1902).
[148] 185 U. S., p. 303.
[149] 120 U. S., 678 (1887).

for that purpose, freely enter our ports with their ships and cargoes, and reside or do business here. Thus the treaty of commerce with Italy of February 26, 1871, provides that 'Italian citizens in the United States, and citizens of the United States in Italy, shall mutually have liberty to enter, with their ships and cargoes, all the ports of the United States and of Italy respectively, which may be open to foreign commerce. They shall also have liberty to sojourn and reside in all parts whatever of said territories.' Article 1, 17 Stat. 845. Those stipulations operate by their own force; that is, they require no legislative action for their enforcement. Treaty of Commerce with Great Britain in 1815, Article 1, 8 Stat. 228; renewed and continued for ten years by Article 4 of the treaty of 1818, 8 Stat. 249; and continued indefinitely by Article 1 of the treaty of 1827, 8 Stat. 361; treaty with Bolivia of May 13, 1838, Article 3, 12 Stat. 1009; treaty with Costa Rica of July 10, 1851, Article 2, 10 Stat. 917; treaty with Greece of December, 1837, Article 1, 8 Stat. 498; treaty with Sweden and Norway of July 5, 1827, Article 1, 8 Stat. 346.

"The right or privilege being conferred by the treaty, parties seeking to enjoy it take whatever steps are necessary to carry the provisions into effect. Those who wish to engage in commerce enter our ports with their ships and cargoes; those who wish to reside here select their places of residence, no congressional legislation being required to provide that they shall enjoy the right and privileges stipulated."[150]

During the period covering the cases which we have analyzed many justices sat upon the bench of the Supreme Court of the United States; yet not one dissented when it was repeatedly held that a treaty may by its terms be made self-executing and is then to have the force of an act of Congress; that this principle was true even when the subject dealt with was one committed by the Constitution to the legislation of Congress; that where provisions of treaties and statutes conflict and there fails the effort to reconcile them (always the duty of a Court when possible), the latest in point of date must prevail. These principles have become part of constitutional law. Such is the conclusion written for us by the long line of cases, the analysis of which we have just concluded. And yet it is said by one essayist today that the question is open for the Supreme Court "to hold that no treaty dealing with matters entrusted to Congress is self-executing";[151] and for another essayist to maintain "that so far as the domestic and intra-territorial effect of the exercise

[150] Ibid., pp. 703–4.

[151] C. P. Anderson, *American Journal of International Law*, Vol. I., Part II., p. 654.

of any of the powers committed by the Constitution to Congress are concerned, Congress alone has any power in the premises," and no treaty has any domestic force "in the sense intended by the Constitution when it says a treaty is the supreme law of the land." "To be that," adds Professor Mikell, "it must be sanctioned by an Act of Congress."[152] How is it possible—the question obtrudes itself—for these views to be put forward? One superficial explanation might be that, in an essay on this subject covering fifty-nine printed pages, Professor Mikell has deemed it unnecessary to discuss a single one of the cases analyzed above, beginning with United States *vs.* Schooner Peggy, and Foster & Elam *vs.* Neilson, decided in 1801 and 1829 respectively, and ending with Johnson *vs.* Browne, decided in 1907.[153] And it will hardly be proper to do otherwise than assume that the members of Congress who spoke on the subject were familiar with these cases. But the determining reason lies deeper and resides in a confusion of thought and an overlooking of a distinction already indicated. Article VI. of the Constitution deals with *individual* rights secured by treaty provisions and not with *national* questions. In this national aspect, it is to the political side of the government that questions respecting treaties address themselves, and with those, as we have seen, the Courts can have nothing to do: Article VI. of the Constitution has no application. So with the acquisition and cession of territory; so with treaties undertaking in the form of a contract that something shall be done. It is for Congress to meet the national obligation, or, in a grave issue, to exercise its discretion in repudiating the undertaking of the government and disavowing its treaty obligations. So formally and avowedly in 1798 did Congress act respecting the treaties with France, so in effect did Congress act, as has been seen, in regard to the treaty with China. And it is likewise true that in questions of tariff duties, affecting the nation vitally and creating as well individual rights and

[152] *American Law Register*, Vol. 57, p. 456.

[153] Of them, Mr. Mikell only mentions one—Geofroy *vs.* Riggs—as authority for a definition, two others—The Cherokee Tobacco, and Head Money Cases—to make from them quotations in a note, and two more—Whitney *vs.* Robertson, and Taylor *vs.* Morton—as authority for the fact that an act of Congress may repeal a treaty.

obligations, there is a natural resolution of forces in favor of joint action by the treaty-making power and by Congress. Party government tends that way; a sense of responsibility toward the people and of delicacy toward the other contracting nation, would wish to avoid any possible friction. Today it has become a matter almost of legislative precedent, that Congress shall fix duties when questions of reciprocity arise.[154] The present action of the government with respect to Canadian reciprocity above set forth is a conspicuous and opportune example. This is legislative precedent of high significance as to future political action: it is no more. The validity of treaty provisions dealing with this and kindred subjects is sustained and controversy thereon foreclosed by the series of cases examined. Apart from the undeviating current of declared doctrine on the subject, the cases of United States *vs.* Schooner Peggy,[155] and of Geofroy *vs.* Riggs[156] are judgments that certain Acts of Congress were superseded by treaty provisions, while the case of Fok Yung Yo *vs.* United States[157] gives to a treaty the effect of a statute. If a treaty be neither of wholly national import nor executory in its nature, and assume to create and declare individual rights and obligations, then those rights and obligations must, if the treaty itself is to have the force of law, have the same validity as though created by legislative action and receive recognition in the courts. There is no escape from this position. Assume the premise that Article VI. of the Constitution means what it says, and logic itself writes the conclusion. But if legislative action were necessary to give treaty provision the force of law intraterritorially, then not the *treaty* but the *legislative act* would be "the supreme law of the land," Article VI. *qua treaties,* means nothing, and the statement, that a treaty to be the supreme law of the land "must be sanctioned by an act of Congress" lacks logical coherence. As well say that a recommendation in a President's message is "the supreme law of the land when sanctioned by an act of Congress." Either treaty provisions can, without further action, give to the rights created and declared thereby the force of law, or they cannot. If not, they cannot be called "the supreme law of the land."

[154] *Supra,* pp. 38–42.
[155] *Supra,* pp. 76–78.
[156] *Supra,* pp. 95–97.
[157] *Supra,* p. 101.

It is judicial utterance and judicial precedence which will determine the validity of a treaty dealing with subjects committed to the legislation of Congress, and the Supreme Court will beyond peradventure follow the long line of its recorded decisions. But if the opinions of members of Congress come with such authority to some, why is it not wisest to listen to one who himself signed the Constitution and lived among the men and the events which created it? On the floor of the House on January 10, 1816, Charles C. Pinckney thus spoke:

"I lay it down as an incontrovertible truth, that the constitution has assumed (and indeed how could it do otherwise) that the government of the United States might and would have occasion, like the other governments of the civilized world, to enter into treaties with foreign powers, upon the various subjects, involved in their mutual relations; and further, that it might be, and was proper to designate the department of the government in which the capacity to make such treaties should be lodged. It has said accordingly, that the president, with the concurrence of the senate, shall possess this part of the national sovereignty; it has, furthermore, given to the same magistrate, with the same concurrence, the exclusive creation and control of the whole machinery of diplomacy. He ouly, with the approbation of the senate, can appoint a negotiator, or take any step towards a negotiation. The constitution does not, in any part of it, even intimate that any other department shall possess either a constant or an occasional right to interpose in the preparation of any treaty, or in the final perfection of it. The president and senate are explicitly pointed out as the sole actors in that sort of transaction.

"The prescribed concurrence of the senate, and that too by a majority greater than the ordinary legislative majority, plainly excludes the necessity of congressional concurrence. If the consent of congress to any treaty had been intended, the constitution would not have been guilty of the absurdity of putting a treaty for ratification to the president and senate exclusively, and again to the same president and senate, as portions of the legislature. It would have submitted the whole matter at once to Congress; and the more especially, as the ratification of a treaty by the senate, as a branch of the legislature, may be by a smaller number than a ratification of it by the same body, as a branch of the executive government. If the ratification of any treaty by the president, with the consent of the Senate, must be followed by a legislative ratification, it is a mere nonentity. It is good for all purposes, or for none. And if it be nothing in effect, it is a mockery by which nobody would be bound. The President and senate would not themselves be bound by it; and the ratification would at last depend, not upon the will of the president and two thirds of the senate, but upon the will of a bare majority of the two branches of the legislature, subject to the qualified legislative control of the President.

"Upon the power of the President and senate, therefore, there can be no doubt. The only question is, as to the extent of it; or, in other words, as to the subject upon which it may be exerted. The effect of the power, when exerted within its lawful sphere, is beyond the reach of controversy. The constitution has declared, that whatsoever amounts to a treaty made under the authority of the United States, shall immediately be supreme law. It has contradistinguished a treaty as law, from an act of congress as law. It has erected treaties, so contradistinguished, into a binding judicial rule. It has given them to our courts of justice, in defining their jurisdiction, as a portion of the lex terra, which they are to interpret and enforce. In a word, it has communicated to them, if ratified by the department which it has specially provided for the making of them, the rank of law—or it has spoken without meaning. And, if it has elevated them to that rank, it is idle to attempt to raise them to it by ordinary legislation.

"It is clear, that the power of congress, as to foreign commerce, is only what it professes to be in the constitution, a legislative power—to be exerted municipally, without consultation or agreement with those with whom we have an intercourse of trade. It is undeniable, that the constitution meant to provide for the exercise of another power relatively to commerce, which should exert itself in concert with the analogous power in other countries; and should bring about its results, not by statute enacted by itself, but by an international compact called a treaty; that it is manifest, that this other power is vested by the constitution in the president and senate, the only department of the government which it authorizes to make any treaty, and which it enables to make all treaties; that if it be so vested, its regular exercise must result in that which, as far as it reaches, is law in itself—and, consequently, repeals such municipal regulations as stand in its way; since it is expressly declared by the Constitution, that treaties regularly made, shall have, as they ought to have, the force of law."[158]

III.

The second fundamental question presented, as we have seen, by an analysis of the functions of the treaty-making power, is: When a treaty deals with a subject upon which the State as opposed to Congress are authorized to legislate, is such treaty valid? or rather, what is its status?

An historical and inductive study of the cases upon a given subject is beyond doubt the best method of approach toward its comprehension, when the question is one having its origin in judicial precedent. But when the question be primarily one of interpretation of a written instrument, it becomes clear that the facts sur-

[158] Elliott's Debates, Vol. IV., pp. 276–8, Ed. of 1830.

rounding the creation of that instrument must first be analyzed and understood before an attempt be made to follow the judicial interpretation thereof.

The language of the Constitution is as follows:

"All treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."[159]

These plain and precise words of the Constitution have not sufficed to impress their apparent meaning upon the minds of many. Accordingly the essayist already quoted thus concludes his discussion of the question now before us: The doctrine that the treaty-power "is supreme over the reserved rights of the States is by no means established in our jurisprudence."[160]

One may venture the surmise that were the question free from *political* significance, no such effort to escape the evident meaning of English words would be conceived to be possible. But the question *has* its political aspect, has always had it; and the doubt of political opponents born of their wishes has again been uttered.

It is easy for the lawyer to fall into the error of regarding the Constitution as a neutral document susceptible of diverse interpretation according as its critic be a States-right advocate or a Federalist. *Any* document viewed through political eyes is susceptible of such treatment: the political critic is capable in the interests of party of any brutality of interpretation. And it is true that the existence of a political aspect to all constitutional questions has always and necessarily been realized by the Supreme Court. But what is *not* always borne in mind is the historical fact that the advocates and opponents of an effective Federal government, superior within the scope of its activities to the State governments, fought out their differences at the time of the creation of the Constitution, and the advocates won. Here and there through the Constitution are concessions made to the opponents: the Senate with its equality of State representation guaranteed to be inviolable, the slavery clauses, the first ten amendments. But in its fundamental essentials the Consti-

[159] Article VI., Clause 2.

[160] *American Law Register,* Vol. 57, p. 554.

tution was written by Federalists who well knew what they wished to achieve. There were the three activities of the new nation, the legislative, the executive, the judicial; and into its hands were placed, as Patrick Henry complained, the purse and the sword:[161] it was given the power to tax, it could command an army to do its will. To guard these powers a new judiciary—the Federal—was created, to whom was committed the interpretation of this Constitution—a power never before in the world's history vested in any court. Not adventitiously nor by the caprice of smiling fate, did those words, constituting treaties and acts of Congress the supreme law of the land, come into the Constitution. Against persistent, bitter, and all but successful opposition, the Federalists wrote them into the Constitution; and once there, by the mouth of that great Federalist John Marshall, they were interpreted to mean precisely what they said.

Under the Articles of Confederation any effective government was demonstrated to be impossible to the United States. Among the existing difficulties stood out prominently two: lack of means to secure money for the general government; neglect of the several States to recognize the provisions of treaties negotiated by the United States.

Congress had unanimously ratified the treaty of peace with Great Britain in 1783. By its provisions, "The great and principal objects," to use the language of the Supreme Court in afterwards construing it,

"were *three* on the part of Great Britain, to wit, 1st: a recovery by British Merchants, of the value in sterling money of debts contracted, by the citizens of America, before the treaty. 2nd: Restitution of the confiscated property of real British subjects, and of persons residents in districts in possession of the British forces, and who had not borne arms against the United States; and a conditional restoration of the confiscated property of all other persons: and 3rdly: A prohibition of all future confiscations, and prosecutions."[162]

The Court continues:

"The following facts were of the most public notoriety, at the time when the treaty was made, and therefore must have been very well known to

[161] Elliott's Debates, Vol. II., p. 539, Ed. of 1854.

[162] Ware *vs.* Hylton, 3 Dallas, p. 238.

the gentlemen who assented to it. 1st. That British debts, to a great amount, had been paid into some of the State Treasuries, or loan offices, in paper money of very little value, either under laws confiscating debts, or under laws authorizing payment of such debts in paper money, and discharging the debtors. 2nd. That tender laws had existed in all the States; and that by some of those laws, a tender and a refusal to accept, by principal or factor, was declared an extinguishment of the debt. From the knowledge that such laws had existed there was good reason to fear that similar laws, with the same or less consequences, might be again made (and the fact really happened), and prudence required to guard the British creditor against them. 3rd: That in some of the States property, of any kind, might be paid, at an appraisement, in discharge of any execution. 4th: That laws were in force in some of the States, at the time of the treaty, which prevented suits by British creditors. 5th: That laws were in force in other of the States, at the time of the treaty, to prevent suits by any person for a limited time. All these laws created legal impediments, of one kind or another, to the recovery of many British debts, contracted before the war; and in many cases compelled the receipt of property instead of gold and silver."[163]

And the Court held it to be the very evident intendment of the language used in the treaty to effectuate the three objects already set forth. This case of Ware *vs.* Hylton in which these foregoing observations are found, will be examined later in detail.[164] The judge merely recited facts of universal knowledge. Under the Articles of Confederation Congress indeed had the exclusive power to make treaties, but nowhere was any power vested in the Federal government to *enforce* the provisions of treaties. State after State either passed new acts violative of the treaty of peace, or proceeded to enforce existing acts equally obnoxious. Dr. McMaster observes:

"The open contempt with which, in all parts of the country, the people treated the recommendation of Congress concerning the refugees and the payment of the debts, was no more than any man of ordinary sagacity could have foretold."[165]

And elsewhere the same historian states:

"There were some Articles [of the treaty] which the people had long before made up their minds never should be carried out."[166]

[163] Ware *vs.* Hylton, 3 Dallas, p. 238.

[164] *Infra*, pp. 135–146.

[165] "A History of the People of the United States," John B. McMaster, Vol. 1, p. 130.

[166] Ibid., p. 107.

The situation was intensified by the fact that Great Britain had refused to surrender the posts along the western frontier, and had supported her refusal by alleging the treatment of British creditors contrary to the provisions of the treaty. The diplomatic efforts of John Adams as minister to Great Britain to secure an evacuation of these posts, and a treaty of commerce, were rendered abortive and even pathetic by the ever fatal demonstration that whatever the Confederation might do, the several States would undo.[167] Said *The Federalist:*

"The treaties of the United States, under the present confederation, are liable to the infraction of thirteen different legislatures and as many different courts of final jurisdiction, acting under the authority of these legislatures. The faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions and the interests of every member, of which these are composed. Is it possible, under such circumstances, that the people of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation."[168]

Washington's well-known words, quoted in his life by Marshall, expressed a recognition of the conditions: Foreign nations, he said, with whom we wish to enter into treaty,

"must see and feel that the Union, or the States individually, are sovereign as best suits their purposes:—in a word, we are a nation to-day, and thirteen to-morrow. Who will treat with us on such terms?"[169]

In the debates in the Federal Convention, Madison in objecting to the New Jersey plan said:

"Will it prevent those violations of the law of nations and of treaties which if not prevented must involve us in the calamities of foreign wars? The tendency of the States to these violations has been manifested in sundry instances. The files of Congress contain complaints already, from almost every nation with which treaties have been formed. Hitherto indulgence has been shown to us. This cannot be the permanent disposition of foreign nations. A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of the nation shall have it in its power to bring them on the whole. The existing confederacy does (not) sufficiently provide against this evil. The proposed amendment to it does not supply the omission. It leaves the will of the States as uncontrouled as ever."[170]

[167] Ibid., Vol. I., Chap. III.
[168] *The Federalist,* No. 22.
[169] Marshall's "Life of Washington," 1st Ed., Vol. V., Chap. 2, p. 73.
[170] Farrand, Vol. I., p. 316.

In the debates in the State conventions which ratified the Constitution, the same unanimous recognition of existing conditions is manifest. In Connecticut, Oliver Ellsworth said:

"Another ill consequence of this want of energy is, that treaties are not performed. The treaty of peace with Great Britain was a very favorable one for us. But it did not happen perfectly to please some of the States, and they would not comply with it. The consequence is, Britain charges us with the breach, and refuses to deliver up the forts on our northern quarter."[171]

In Massachusetts, Samuel Adams rose to say of the Constitution, the adoption of which he had long opposed:

"Sir, there are many parts of it I esteem as highly valuable, the article which empowers Congress to regulate commerce, to form treaties, etc. For want of this power in our national head, our friends are grieved, and our enemies insult us. Our embassador at the Court of London is considered as a mere cipher, instead of the representative of the United States."[172]

The President of the Virginia Convention spoke as follows:

"The moment of peace showed the imbecility of the Federal government: Congress was empowered to make war and peace; a peace they made, giving us the great object independence, and yielding us a territory that exceeded my most sanguine expectations. Unfortunately a single disagreeable clause, not the object of the war, has retarded the performance of the treaty on our part. Congress could only recommend its performance, not enforce it; our last assembly (to their honor be it said) put this on its proper ground—on honorable grounds—it was as much as they ought to have done. This single instance shews the imbecility of the confederation; the debts contracted by the war were unpaid; demands were made on congress; all that congress was able to do, was to make an estimate of debt, and proportion it among the several states; they sent on the requisitions from time to time, to the states for their respective quotas. These were either complied with partially, or not at all; repeated demands on congress distressed that honorable body; but they were unable to fulfill those engagements which they so earnestly wished. What was the idea of other nations respecting America? What was the idea entertained of us by those nations to whom we were so much indebted? The inefficacy of the general government warranted an idea that we had no government at all."[173]

The language of Governor Randolph answers these rhetorical questions:

"We become contemptible in the eyes of foreign nations; they discarded

[171] Elliott's Debates, Vol. II., Ed. of 1854, p. 189.
[172] Elliott's Debates, Vol. I., p. 131.
[173] Elliott's Debates, Vol. II., p. 58.

us as little wanton bees who had played for liberty, but who had no sufficient solidity or wisdom to secure it on a permanent basis, and were therefore unworthy of their regard. It was found that congress could not even enforce the observance of treaties. That treaty under which we enjoy our present tranquility was disregarded."[174]

Madison, a delegate to the Federal Convention, and a signer of the Constitution, thus pictured the existing conditions:

"The confederation is so notoriously feeble, that foreign nations are unwilling to form any treaties with us—they are apprised that our general government cannot perform any of its engagements; but, that they may be violated at pleasure by any of the States. Our violation of treaties already entered into, proves this truth unequivocally. No nation will therefore make any stipulations with congress, conceding any advantages of importance to us; they will be the more averse to entering into engagements with us, as the imbecility of our government enables them to derive many advantages from our trade, without granting us any return. But were this country united by proper bands, in addition to other great advantages, we could form very beneficial treaties with foreign states. But this can never happen without a change in our system. Were we not laughed at by the Minister of that nation, from which we may be able yet to extort some of the most salutary measures for this country? Were we not told that it was necessary to temporize till our government acquired consistency? Will any nation relinquish national advantages to us? You will be greatly disappointed, if you expect any such good effects from this contemptible system."[175]

Universal was the desire for amelioration of the existing conditions, and out of that desire and the conflict of opinion came the Constitution. It was debated by the Convention which framed it, it was discussed by publicists and individuals, it was again debated in each of the State conventions which considered its ratification. Yet nowhere, so far as a careful search has revealed, was there a question raised but that the meaning and intended effect of the words in the Constitution respecting the status of treaties, was, that a provision in any treaty properly expressed operated in despite of any State enactment as municipal and local law within that State and overrode all and any constitution, statute, or common law in derogation thereof. Men opposed the wisdom of this constitutional provision; they united in recognizing its novel, almost revolutionary significance.

[174] Ibid., p. 50.
[175] Ibid., p. 128.

PROC. AMER. PHIL. SOC., LI. 206 S, PRINTED SEPT. 6, 1912.

There is nothing surprising in this unanimity of contemporary interpretation. Every one knew that the great majority of the nation concurred in the necessity of making treaty provisions supreme over the caprice of State legislatures: the method to be adopted had been an object of controversy. Early, in the constitutional convention, as we have seen,[176] a resolution had been presented granting to Congress the power, *inter alia,* "to negative all laws passed by the several States contravening in the opinion of the national legislature the Articles of Union or any treaties subsisting under the authority of the Union." This resolution had been defeated and the following substituted and adopted:

"*Resolved,* that the legislative acts of the United States, made by virtue and in pursuance of the Articles of union, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective States, as far as those acts, or treaties, shall relate to the said States, or their citizens and inhabitants;—and that the judiciaries of the several States shall be bound thereby in their decisions—anything in the respective laws of the individual States to the contrary, notwithstanding."[177]

This resolution, modified considerably as to style and somewhat extended in substance, became the clause in the Sixth Article of the Constitution. In Professor Farrand's book on "The Record of the Federal Convention" are to be found the *memoranda* of the committee of detail, of which Professor Farrand says:

"With a few additions from other sources, it is possible to present a nearly complete series of documents representing the various stages of the work of the Committee."[178]

Among these documents is the following tentative provision afterwards embodied in the Sixth Article of the Constitution:

"All laws of a particular State, repugnant hereto, shall be void, and in the decision thereon, which shall be vested in the supreme judiciary, all incidents without which the general principles cannot be satisfied shall be considered as involved in the general principle."[179]

Those who opposed the adoption of the treaty-making power in its extent and supremacy, and those who favored it, united in the recognition of the purpose, meaning, and effect of the language

[176] *Supra,* pp. 17–19.
[177] Farrand, Vol. II., pp. 28–9.
[178] Ibid., p. 129.
[179] Ibid., p. 144.

used in the Sixth Article of the Constitution. That was a thing admitted. Accompanying the transmission of the Constitution to Congress was a letter unanimously approved by the Convention, and signed by George Washington, as its President. In that letter it is said:

"The friends of our country have long seen and desired, that the power of making war, peace, and treaties, that of levying money and regulating commerce, and the correspondent executive and judicial authorities should be fully and effectually vested in the general government of the Union."[180]

In the essay already quoted, Professor Mikell, after urging that the treaty-making power of the United States cannot operate to affect State law upon any subject not expressly committed to Congress, continues:

"The issue has been much obscured by the specious plea that it is intolerable that a State should enact laws in conflict with a treaty and by taking away rights guaranteed to foreigners, under such treaty, give just cause of offense to a foreign nation, and even possibly imperil the peace of the whole Union."[181]

It is interesting to note that, in this view, Washington, Madison, Randolph, Pendleton, Ellsworth, Hamilton, Adams, by the quotations above made, and all who under their guidance voted for the Constitution, made use of this "specious plea." It is just possible that a student of those four years of American history from the Treaty of peace in 1783 to the creation of the Constitution in 1787, might conclude that the condition of affairs then existing because of State disregard of treaties, was superior to the conditions wrought by the Constitution. But it is very clear that none of the statesmen who had suffered through those days shared this conclusion. Yet, consideration as to whether Washington, Hamilton, Madison, Randolph, Adams, and the others were right or wrong, does *not* reach the precise issue. And that issue is: What do the treaty clauses in the Constitution *mean?* It cannot be gainsaid that treaties were not effective law supreme over State enactments under the Confederation; it cannot be gainsaid that Washington and the contemporary statesmen who created the Constitution thought (how-

[180] Ibid., p. 666.

[181] *American Law Register,* Vol. 57, p. 554.

ever speciously) this condition wrong; it cannot be gainsaid that they wrote the clause under discussion into the Constitution and advocated its adoption; it cannot be gainsaid that contemporaneously and as a reason for its adoption they interpreted it as creating a condition of affairs under the Constitution exactly contrary to that existing under the Confederation; namely, a condition where treaties would be supreme and forever beyond the power of any State to infringe. The only issue therefore that can be logically raised is: Is the language of the Constitution so ambiguous, so capable of diverse construction, that one can fairly say that, whatever the intention of its framers, it fails to express such intention? Or to put this question concretely: When the Constitution says: "All treaties . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding"—are these words so ineffective to carry their meaning that it may still be said that treaties attempting to deal with any subjects not committed to Congress have no operative force within the several States? If so, the failure of the statesmen of America to express their thought would be without a parallel in history. But it is not so. The language is clear; if not the contemporary *intention* of its authors, certainly its contemporory *interpretation* must control.

In the debates in the Pennsylvania Convention, James Wilson thus combined a realization of existing conditions, a statement of the remedy to be applied, and an interpretation of the treaty-provisions of the Constitution as adequate to that end:

"The judicial power extends to all cases arising under treaties made, or which shall be made by the United States. I shall not repeat at this time, what has been said with regard to the power of the States to make treaties; it cannot be controverted, that when made, they ought to be observed. But it is highly proper that this regulation should be made, for the truth is, and I am sorry to say it, that in order to prevent the payment of British debts, and from other causes, our treaties have been violated, and violated too by the express laws of several States in the Union. Pennsylvania, to her honor be it spoken, has hitherto done no act of this kind; but it is acknowledged on all sides, that many states in the Union have infringed the treaty; and it is well known that when the minister of the United States made a demand on Lord Carmarthen, of a surrender of the western posts, he told the minister

with truth and justice: 'the treaty under which you claim those possessions, has not been performed on your part; until that is done, those possessions will not be delivered up.' This clause, sir, will shew the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry into effect, let the legislatures of the different states do what they may."[182]

It will be noted at greater length hereafter but it should be noted now that these words were spoken of an existing treaty, of existing State laws, and of a subject *not* committed to Congress but reserved to the States.

Wilson had signed the Constitution as a delegate to the Federal convention. But the opponents of the extent and supremacy of the treaty-making power united in a similar interpretation of the constitutional clauses. Luther Martin was a delegate from Maryland and refused to sign the Constitution. To his State legislature he gave an account of the proceedings and of the reason for his actions. Of the Federal judicial power he said:

"These courts, and these only, will have a right to decide upon the laws of the United States, and all questions arising upon their construction, and in a judicial manner to carry those laws into execution; to which the courts both superior and inferior of the respective states and their judges and other magistrates are rendered incompetent. To the courts of the general government are also confined all cases in law or equity, arising under the proposed Constitution, and treaties made under the authority of the United States. . . . Whether therefore, any laws or regulations of the Congress, or any acts of its president or other officers are contrary to, or not warranted by, the Constitution, rests only with the judges who are appointed by Congress to determine; by whose determinations *every state*[183] must be *bound*."[184]

George Mason, one of the delegates from Virginia to the Federal Convention, thus wrote in a letter giving his reasons for declining to sign the Constitution:

"By declaring all treaties supreme laws of the land, the executive and the Senate have, in many cases, an exclusive power of legislation, which might have been avoided, by proper distinctions with respect to treaties, and requiring the assent of the House of Representatives, where it could be done with safety."[185]

[182] Elliott's Debates, Vol. III., pp. 280–1.
[183] Italics are in original.
[184] Elliott's Debates, Vol. IV., p. 45, Ed. of 1830.
[185] Ibid., Vol. I., p. 495, Ed. of 1854.

Richard Henry Lee, another delegate from Virginia, gave similar reasons:

"In the new Constitution, the President and Senate have all the executive, and two thirds of the legislative power. In some weighty instances (as making all kinds of treaties, which are to be the laws of the land), they have the whole legislative and executive powers."[186]

Patrick Henry was a violent opponent of the adoption of the Constitution in the Virginia debates. The reporter says that he urged that

"the power of making treaties, by this Constitution, ill-guarded as it is, extended farther than it did in any country in the world.—Treaties were to have more force here than in any part of christendom. For he defied any gentleman to shew anything so extensive in any strong energetic government in Europe. Treaties rest, says he, on the laws and usages of nations. To say that they are municipal, is, to me, a doctrine totally novel. To make them paramount to the Constitution, and laws of the states, is unprecedented. I would give them the same force and obligation they have in Great Britain, or any other country in Europe. Gentlemen are going on in a fatal career; but I hope they will stop before they concede this power unguarded and unaltered."[187]

In the North Carolina convention, Mr. Bloodworth thus opposed the supremacy assigned to the acts of Congress and to the treaty-making power:

"This clause will be the destruction of every law which will come in competition with the laws of the United States. Those laws and regulations which have been, or shall be made in this state, must be destroyed by it if they come in competition with the powers of Congress."[188]

To him Governor Johnston thus replied:

"The Constitution must be the supreme law of the land, otherwise it will be in the power of any one state to counteract the other states, and withdraw itself from the Union. The laws made in pursuance thereof by Congress, ought to be the supreme law of the land, otherwise any one state might repeal the laws of the Union at large. Without this clause, the whole Constitution would be a piece of blank paper. Every treaty should be the supreme law of the land; without this, any one state might involve the whole Union in war."[189]

[186] Ibid., Vol. I., p. 503, Ed. of 1854.
[187] Ibid., Vol. II., p. 368.
[188] Ibid., Vol. III., p. 160.
[189] Ibid., Vol. III., p. 166.

In the Virginia convention George Nicholas quoted from Blackstone a passage to show the status of treaties in Great Britain, and adds:

"The president and senate have the same power of making treaties; and when made they are to have the same force and validity. They are to be the supreme law of the land here—this book shews us they are so in England. Have we not seen in America that treaties were violated, though they are in all countries considered as the supreme law of the land? Was it not therefore necessary to declare in explicit terms, that they should be so here?"[190]

Later in these Virginia debates Mr. Corbin, assuming the unanimous interpretation, argued for the wisdom of the clause:

"It is as clear, as that two and two make four, that the treaties made are to be binding on the states only. Is it not necessary that they should be binding on the states? Fatal experience has proven that treaties would never be complied with, if their observance depended on the will of the states; and the consequences would be constant war. For, if any one state could counteract any treaty, how could the United States avoid hostility with foreign nations? Do not gentlemen see the infinite dangers that would result from it, if a small part of the community could drag the whole confederacy into war?"[191]

Such were the conditions out of which were evolved the treaty clauses of the Constitution; such was the universal contemporary analysis of their purpose, significance, and import.

It has been noted that the clause assuming to insure supremacy to treaty provisions, past and future, was adopted to cover existing practical controversies. Did none of them—the question asks itself—reach the courts, and result in an authoritative declaration interpreting these discussed clauses? What did the courts decree when British creditors sought to recover debts, and British claimants of land sought to recover possession, in reliance on existing treaty provisions? The answer is that the case of Ware *vs.* Hylton[192] recognized in 1796 the rights of British creditors, and the case of Fairfax *vs.* Hunter,[193] decided in 1812, determined that the title of an alien was saved by the treaty of peace.

It has been noted that in debating the constitutional provision on the subject, James Wilson had said:

[190] Ibid., Vol. II., pp. 372–3.
[191] Ibid., Vol. II., p. 375.
[192] 3 Dallas, 199 (1796).
[193] 7 Cranch, 603 (1812).

"I am sorry to say it, that in order to prevent the payment of British debts, and from other causes, our treaties have been violated, and violated too by the express laws of several States in the Union. . . . This clause, sir, will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry into effect, let the legislatures of the different states do what they may."[194]

In the Virginia debates, Governor Randolph had likewise expressly adverted to this concrete cause to be subserved directly by the adoption of the Constitution.

"I come now to what will be agitated by the judiciary. They are to enforce the performance of private contracts. The British debts, which are withheld contrary to treaty, ought to be paid."[195]

The Constitution was adopted, a British creditor brought suit, and on appeal the case was argued in the Supreme Court by John Marshall on behalf of the debtor. In a volume of reports comprising 519 pages and covering a period of over five years the report of this case is allotted 87 pages; the opinions of the court cover over 64 pages. This is conclusive evidence of the contemporary estimate of its importance. The suit arose on a bond given by Virginian citizens, and was brought in the Federal court for the District of Virginia. The facts material in the present discussion, in addition to the citizenship of the parties and the notorious fact of war, were these. In 1774, the bond was dated. In 1777, an Act of Virginia was passed entitled "An Act for Sequestering British Property," and providing that full discharge of the debt should be created by the payment of the sum due to the commonwealth. In 1780, payment in accordance with the act was made by the defendant. In 1783, the treaty of peace was made. In 1788, the Constitution was declared operative by Congress. Marshall thus divided his argument. I. That the Virginia Act was effective as a bar (ignoring for the moment the treaty) because (*a*) the State had the power to create a bar; and (*b*) the State had by the Act exercised its power; II. That the treaty did not remove the bar. Marshall argued (*a*) that the Act had operated in 1780 to extinguish the debt, that therefore in 1783 there was no debt and no creditor upon whom

[194] Elliott's Debates, Vol. III., pp. 280–1.

the treaty might operate when it provided "that creditors on either side shall meet with no lawful impediment to the recovery of the full value, sterling money, of all *bona fide* debts heretofore contracted"; (*b*) that the treaty should not be interpreted to repeal an act known to the commissioners who framed the treaty, without express language of repeal; (*c*) that the treaty, if it operated to deprive the debtor of a right which had vested in 1780 three years before the date of the treaty, was beyond the power of Congress.

The judgment of the Court was in favor of the creditor. Four of the five judges delivered their opinions. All concurred in upholding the power of Virginia to pass the Act of 1777 and in its efficacy apart from treaty stipulation. Mr. Justice Iredell alone dissented on the ground that while the treaty operated to repeal the Virginia statute, it could not properly be interpreted as operating to annul acts done under it while in force and prior to its repeal.

It will be observed that the annulment of the Virginia statute might logically be maintained in either or both of two ways: First, because of the operation to that extent of the treaty by virtue of the Articles of Confederation and of the assent thereto by Virginia as a State; second, by the supreme efficacy given to the treaty by the Constitution. A careful study of the opinions of Mr. Justice Chase and of Mr. Justice Paterson[196] shows that they placed their decision upon *both* grounds; Mr. Justice Wilson placed his concurrence on the first, and was silent as to the second; Mr. Justice Iredell denied the validity of the first ground, and acquiesced emphatically in the validity of the second (dissenting in the interpretation he gave to the treaty). Said Mr. Justice Chase upon the second ground:

"If doubts could exist before the establishment of the present national government, they must be entirely removed by the 6th article of the Constitution, which provides 'That all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and

[195] Ibid., Vol. II., p. 352.

[196] The acquiescence of Mr. Justice Paterson in the first ground is shown by these words: "If the Legislature had authority to make the act, the Congress could, by treaty, repeal the act, and annul everything done under it," at p. 249. His acquiescence in the second ground is shown by his rather technical opinion having as its object the sustaining of the demurrer to the second plea which demurrer relied wholly on the constitutional provision.

the judges in every State shall be bound thereby, anything in the Constitution, or laws, of any State to the contrary notwithstanding.' There can be no limitation on the power of the people of the United States. By their authority the State constitutions were made, and by their authority the Constitution of the United States was established; and they had the power to change or abolish the State Constitutions, or to make them yield to the general government, and to treaties made by their authority. A treaty cannot be the supreme law of the land, that is of all the United States, if any act of a State legislature can stand in its way. If the Constitution of a State (which is the fundamental law of the State, and paramount to its legislature) must give way to a treaty, and fall before it; can it be questioned, whether the less power, and act of the state legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made, by the authority of the United States, shall be superior to the Constitution and laws of any individual State; and their will alone is to decide.—If a law of a State, contrary to a treaty, is not void, but voidable only by a repeal, or nullification by a State legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole. The people of America have been pleased to declare, that all treaties made before the establishment of the National Constitution, or laws of any of the States, contrary to a treaty, shall be disregarded.

"Four things are apparent on a view of the 6th Article of the National Constitution. 1st. That it is retrospective, and is to be considered in the same light as if the Constitution had been established before the making of the treaty of 1783. 2nd. That the Constitution, or laws, of any of the States so far as either of them shall be found contrary to that treaty are by force of the said article, prostrated before the treaty. 3rd. That consequently the treaty of 1783 has superior power to the Legislature of any State, because no Legislature of any State has any kind of power over Constitution, which was its creator. 4thly. That it is the declared duty of the State judges to determine any Constitution, or laws of any State, contrary to that treaty (or any other) made under the authority of the United States, null and void. National or Federal judges are bound by duty and oath to the same conduct."[197]

Mr. Justice Wilson was of the opinion that the treaty, being made by Virginia as a State, annulled the confiscation.[198] Mr. Justice Iredell expressly disagreed with the other members of the Court as to the efficacy of the treaty provision independent of the Constitution, and held that the treaty could only become effective "by a repeal of the statutes of the different States."[199] With respect to the appli-

[197] 3 Dallas, pp. 235–7.
[198] See note 10.
[199] See note 11.

cability and force of the constitutional provisions Mr. Justice Iredell continued:

"The article in the Constitution concerning treaties I have always considered, and do now consider, was in consequence of the conflict of opinions I have mentioned on the subject of the treaty in question. It was found in this instance, as in many others, that when thirteen different legislatures were necessary to act in unison on many occasions, it was in vain to expect that they would always agree to act as Congress might think it their duty to require. . . . Similar embarrassments have been found about the treaty. This was binding in moral obligation, but could not be constitutionally carried into effect (at least in the opinion of many) so far as acts of legislation then in being constituted an impediment, but by a repeal. The extreme inconveniences felt from such a system dictated the remedy which the Constitution has now provided, 'that all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and that the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.' Under this Constitution therefore, so far as a treaty constitutionally is binding, upon principles of moral obligation, it is also by the vigour of its own authority to be executed in fact. It would not otherwise be the supreme law in the new sense provided for, and it was so before in a moral sense.

"The provision extends to subsisting as well as to future treaties. I consider therefore that when this Constitution was ratified, the case as to the treaty in question stood upon the same footing, as if every act constituting an impediment to a creditor's recovery had been expressly repealed, and any further act passed, which the public obligation had before required, if a repeal alone would not have been sufficient."[200]

Such, so far as expressed, were the *rationes decidendi* of the judges who sat in this case. The judgment in itself deserves, however, the most scrupulous examination. It is given in the report of the case and sustains the demurrer to the second plea. Now, that demurrer was to the effect that after the incurring of the debt, and after the passage of the Virginia act, and after the treaty of peace,

"it was by the Constitution of the United States of America, among other things, expressly declared, that treaties which were then made, or should thereafter be made, under the authority of the United States, should be the supreme law of the land, anything in the said Constitution, or of the laws of any state, to the contrary notwithstanding;"[201]

and that the plaintiff was within the protection of this treaty and the Constitution. And this demurrer was sustained.

[200] 3 Dallas, pp. 276–7.
[201] 3 Dallas, p. 204.

This case is examined by Professor Mikell with the conclusion that it "is no authority for the broad proposition that the treaty-making power is not limited by the reserved rights of the States"[202] —a conclusion based, first, on the fact that the treaty under discussion was one entered into under the Confederation and therefore that "it might well be that greater force should be allowed to" such a treaty; and secondly, on the constitutional provision that States shall not impair contracts. This first conclusion is contrary to (*a*) the judgment itself of the Court and (*b*) the opinions of the justices; (*c*) the historical facts respecting treaties made under the Confederation; (*d*) the interpretation given to this case in the subsequent decisions of the Supreme Court. The second conclusion is curious; for when Virginia passed the Confiscation Act, the Constitution was of course not in force. Professor Mikell must mean that as a confiscation by a State statute cannot now occur, the treaty only deprived Virginia of the power of doing something later forbidden by the Constitution; and hence not a State right today. But this is only to say that the question then before the Supreme Court in Ware *vs.* Hylton could not recur in just that form. But in what way could the *form* matter? The principles and considerations involved would be precisely identical, and the authority of this case equally cogent.[203]

But there is yet a further consideration demonstrating that there is involved in the very tissue of the decision in Ware *vs.* Hylton a recognition of the force and supremacy of the treaty provisions of the Constitution. *Whence else came to the court the power to record its judgment?* Assume the treaty of peace to be valid under the Confederation, as manifestly it was, assume it to be binding on Virginia as a State; in what sense was it binding? Surely by force of international law and not by virtue of any power in Congress to enforce its provisions. Could Congress, by a judiciary it did not possess, by a resolution it had no power to enforce, give to the individual British creditor redress? Could such creditor successfully appeal to a State court? By a fundamental canon of American law

[202] *American Law Register*, Vol. 57, p. 540.

[203] See note 12.

the question whether a treaty be in force is a *political* question for the executive and legislative, not the judicial power. The only remedy afforded a creditor was given by the Constitution which created a judiciary and laid upon it the obligation to enforce treaty-provisions as the law of the land, supreme over State action. The very entry of a judgment in Ware *vs.* Hylton affirmed by its entry the efficacy of the Constitution and the supremacy of treaties over States' rights: except by virtue of the Constitution no judgment could have been entered. It was a subject of curious interest, it is a subject of historical study today, to determine how far the treaty of peace operated of itself to repeal various State statutes in conflict therewith. In international law, it would seem that Mr. Justice Chase was right and Mr. Justice Iredell wrong. If the several States chose to pass statutes and authorize executive acts at variance with the treaty of peace, a grave breach was made in international law, but as binding municipal and local law the treaty was dead. But the question has no practical value. It was the Constitution and the Constitution alone which gave the force of local law to the treaty, and in the Federal judiciary created an effective method for its enforcement. When that judiciary acted, its act was necessarily done under the Constitution and constituted a recognition and example of its existence and its supreme efficacy.[204]

One year later there came before the Supreme Court a case involving one question—

"whether a paper money payment of a British debt into the treasury of Maryland, during the war, by virtue of a law of the State, was a bar to the creditor's recovery at this time."[205]

The reporter adds:

"And the solemn adjudication in Ware *vs.* Hylton et al., ant. p. 199, having settled that point, Dallas, for the defendant in error, submitted the case, without argument, to the Court, who, in general terms, reversed the

[204] If the suggestion be offered that a distinction is possible between "treaties made" and "treaties to be made" as the words are used in Article VI, of the Constitution, and that the former are to be given more force than the latter, the only answer is to say that such suggestion lacks any sanction either in precedent or in reason.

[205] Clerke *vs.* Harwoode, 3 Dallas, 342 (1797).

judgment of the High Court of Appeals, and affirmed the judgment of the general Court."

This case has been generally ignored; it is significant. It came before the Supreme Court of the United States on writ of error to the Supreme Court of Appeals of Maryland, where judgment adverse to the claimant was reversed. In so setting aside the action of the highest judicial agency of the State, and its declaration that the treaty was not binding on its citizen, the United States Supreme Court by its action unequivocally demonstrated that it acted by virtue of the Constitution, and gave effectiveness to the treaty-provisions thereof. If any one could be found to claim that in Ware *vs.* Hylton, the Federal court only acted as a Virignia court might have done, and so its judgment did not necessarily derive its virtue from the Constitution, this case of Clerke *vs.* Harwood shows that no such limitation to the significance of Ware *vs.* Hylton is possible. It cannot be gainsaid that the judgments in these causes, once they be fully analyzed and understood, determine completely and finally the supremacy of treaty provisions over State law.

The decision in Ware *vs.* Hylton was prefigured in the constitutional debates; likewise was it with the decision in Fairfax *vs.* Hunter.[206] In the Virginia debates Mr. Mason spoke vehemently upon the subject.

"I am personally endangered," he said, "as an inhabitant of the Northern Neck. The people of that part will be obliged, by the operation of this power, to pay the quit rents of their lands. Whatever other gentlemen may think, I consider this as a most serious alarm. . . . Lord Fairfax's title was clear and undisputed. After the revolution we taxed his lands as private property. After his death an act of Assembly was made, in 1782, to sequester the quit rents due at his death, in the hands of his debtors. Next year an act was made restoring them to the executor of the proprietor. Subsequent to this the treaty of peace was made, by which it was agreed, that there should be no further confiscations. But after this an act of Assembly passed, confiscating this whole property. As Lord Fairfax's title was indisputably good, and as treaties are to be the supreme law of the land, will not his representatives be able to recover all in the Federal court? How will gentlemen like to pay additional tax on lands in the Northern Neck? This the operation of this system will compel them to do."[207]

[206] 7 Cranch, 603 (1812).

[207] Elliott's Debates, Vol. II., pp. 387–8.

The situation had, however, become complicated when there came before the Supreme Court the title of Lord Fairfax to these lands in the Northern Neck of Virginia. Fairfax died in 1781, a citizen of Virginia; in 1782, statutes were passed reciting his death and the devolution of the estate upon alien enemies, sequestering the quit rents in the tenants' hands, and providing for making entries upon vacant lands within the Northern Neck. After the treaty of peace, an Act was passed in 1785 which recited that no mode had been adopted to enable those who had made entries in accordance with the Act of 1782 to obtain titles, and which then enacted that grants should be given by the Commonwealth. The defendant claimed under a State patent issued pursuant to this Act. Under the will of Lord Fairfax, those estates were devised to one Denny Fairfax, a British subject. Denny Fairfax himself died during the pendency of the suit. Mr. Justice Story delivered the opinion of the Court. He held, first, that the title of Lord Fairfax in 1781 was free from doubt and in this followed the State decisions. He held, secondly, that at common law Denny Fairfax, taking as devisee and not as heir-at-law, "had a complete, though a defeasible title by virtue of the devise." He held, thirdly, that the common law had not been altered by reason of the Virginia statutes. Inasmuch therefore as those acts rendered necessary by the common law to vest title in the Commonwealth had been unperformed, the defeasible title remained in Denny Fairfax. Mr. Justice Story then continued:

"The real fact appears to have been, that the legislature supposed that the Commonwealth were in actual seizin and possession of the vacant lands of Lord Fairfax, either upon the principle that an alien enemy could not take by devise, or, the belief that the Acts of 1782, ch. 8, and ch. 33, had already vested the property in the Commonwealth. In either case it was a mistake. . . .

"Now, we cannot yield to the argument that Denny Fairfax had no title, but a mere naked possession or trust estate. In our judgment, by virtue of the devise to him he held a fee simple in his own right. At the time of the commencement of this suit (in 1791) he was in complete possession and seizin of the land. That possession and seizin continued up to and after the treaty of 1794, which being the supreme law of the land, confirmed the title to him, his heirs and assigns, and protected him from any forfeiture by reason of alienage.

"It was once in the power of the Commonwealth of Virginia, by an

inquest of office or its equivalent, to have vested the estate completely in itself or its grantee. But it has not so done and its own inchoate title (and of course the derivative title, if any, of its grantee) has by the operation of the treaty, become ineffectual and void."[208]

The comments of Professor Mikell upon the case are interesting. "In Fairfax *vs.* Hunter, decided in 1812," he writes,

"Justice Story did indeed say that the treaty of 1794 would have the effect of rendering void the title to land claimed under an act of the legislature of Virginia. All that he said on this point, however,—and it is comprised in a few lines of a long opinion,—is dictum, for he had already shown, in ten pages of his opinion, that the acts of the legislature did not, in fact, vest any title to the land of the claimant. The question of the power of the President and Senate to make such a treaty was not argued in this case."[209]

One might readily say that where a case is put upon two grounds, each of which is adequate to sustain the judgment, the reasons adduced in support of one ground—though it be the last in point of expression—cannot logically or properly be characterized as *dicta*. But in this instance it happens that the efficacy of the treaty of 1794 was essential to the judgment reached. Professor Mikell's zeal has led him into error. To begin with, if rights under the treaty and the Constitution were not directly in issue and denied by the State court, in what possible way does Professor Mikell think the Supreme Court had jurisdiction by writ of error? Does he really think that the Supreme Court intended to say to the State Supreme Court: You have erred in interpreting your own statutes; they show the claimant against Fairfax had no title, on that ground alone we reverse? The Supreme Court, as is clear the moment one begins to think about it, would have no jurisdiction on the very face of its opinion to render such a judgment. The point of Mr. Justice Story's detailed examination of the Virginia acts is to show that the title of Denny Fairfax rose to such dignity as to be saved by the treaty of 1794. Mr. Justice Johnson's dissent on this point throws light on the real significance of the Court's decision but Mr. Justice Story's words in themselves show his thought:

"The title of Hunter under the grant of 1789," he says, "cannot be con-

[208] 7 Cranch, pp. 626–7.

[209] *American Law Register*, Vol. 57, p. 542.

sidered as more extensive than the title of the Commonwealth, viz.: a title inchoate and imperfect; to be consummated by an actual entry under an inquest of office, or its equivalent, a suit and judgment at law by the grantee."[210]

It was recognized by the court that " . . . a suit and judgment at law by the grantee" had occurred in the State courts, and jurisdiction to review by writ of error existed only to enforce rights preserved by the treaty. Mr. Justice Story concluded his opinion with these words:

"It becomes unnecessary to consider the argument as to the effect of the death of Denny Fairfax pending the suit, because admitting it to be correctly applied in general, the treaty of 1794 completely avoids it. The heirs of Denny Fairfax were made capable in law to take from him by descent, and the freehold was not, therefore, on his death, cast upon the Commonwealth."[211]

Here is a positive upholding of the efficacy of the treaty of 1794, essential to the decision. It is most clear under the Virginia law, already analyzed in this case, that upon the death of an alien his land *qua* his heirs-at-law escheated to the Commonwealth. Laconically, Mr. Justice Story dismissed this contention as avoided by the treaty of 1794. Apart from that, it was demonstrably sound. Why was the Court so brief? Because, first, it had already so decided upon the main contention; secondly, it seemed to that Court, familiar with the causes and conditions which had written the treaty clauses into the Constitution, to be unnecessary to dwell upon the plain words of Article VI. of the Constitution then unanimously interpreted as meaning what they said.

But Professor Mikell has one more objection to urge to the binding force of this decision. "The question of the *power* of the President and Senate to make such a treaty was not argued in this case."[212] Doubtless it was not. It was necessary that a century should first pass over the nation, and wipe out the memory of the humiliating years under the Confederation, the efforts of America's early statesmen to cause them to pass and to render it ever impossible for them to recur in her future history, their success in creating

[210] 7 Cranch, p. 626.
[211] Ibid., pp. 627–8.
[212] *American Law Register,* Vol. 57, p. 542.

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the Constitution, the words they spoke in its interpretation, the outcry and revolt against the policy of this very treaty of 1794, but never against its binding though hateful efficacy. May one ask if Ben Jonson's words respecting his contemporary Shakespere lose their force because it was not suggested to him that Shakespere was Bacon?

In Chirac *vs.* Chirac,[213] Mr. Chief Justice Marshall delivered the opinion of the court. The essential facts were that a holder of real estate in Maryland had died in 1799 leaving as heirs-at-law certain French citizens. The decedent had acquired the land while a French citizen and had been naturalized after the adoption of the Constitution. It was held that the treaty with France of 1778 protected his title until he became a citizen of the United States. His death, however, occurred prior to the treaty of 1800; and on this point the Chief Justice said:

"Had John Baptiste Chirac, the person from whom the land in controversy, descended, lived until this treaty became the law of the land, all will admit that the provisions which have been stated would, if unrestrained by other limitations, have vested the estate of which he died seised in his heirs."[214]

It was held that inasmuch as the law of Maryland protected such an estate for ten years, the treaty operated at once upon its execution to vest an absolute title in the French heirs, which was not lost by the subsequent abrogation of the treaty. The discussion of the meaning and effect of the Maryland acts and of the French treaties by Mr. Chief Justice Marshall is long and necessarily complex; he disposes of the fundamental question now examined in the sentence quoted from his opinion above by one phrase: "*all will admit.*" Professor Mikell says of this case also:

"The question of the power of the Federal government to make such a treaty was not argued by counsel or discussed by the Court."[215]

Can any one really believe that an argument on this point would have effaced from Marshall's memory the days through which he had

[213] 2 Wheat., 259 (1817).
[214] Ibid., p. 274.
[215] *American Law Register,* Vol. 57, p. 542.

lived, and have served to alter the judicial history of the United States?

In Orr *vs.* Hodgson,[216] the efficacy of the treaties of 1783 and 1794, to protect British titles from forfeiture, came before the Supreme Court. The case was one in equity to enforce a contract for the sale of lands. The defense was lack of title. One Lucy Paradise, the elder, by birth a Virginian, inherited the land by devise, and in 1769, married in England John Paradise, a British subject. They had one child, Lucy, the younger. She married in England, in 1787, a Venetian subject by whom she had two sons. She died in Venice in 1800. In 1787 John Paradise and his wife Lucy, the elder, came to Virginia, but returned in 1789, where he died in 1796. After his death Lucy, the elder, came to Virginia in 1805, and exercised the right of ownership over the land in controversy till her death, intestate, in 1814. She left surviving two nieces, parties to the suit, and two grandsons in Venice. The defect in the title urged of importance to us was that Lucy Paradise, the elder, by marrying a British subject and remaining in England till long after the Revolution because a British subject. Upon this point the Court held:

> "Admitting that Lucy Paradise did so become an alien, it is material to inquire, what effect the treaty of peace of 1783 had upon her case; and upon the best consideration that we can give to it, we are of opinion that the Sixth Article of that treaty completely protected her estate from forfeiture, by way of escheat for the defect of alienage."[217]

The Court then proceeds to examine the effect of the provisions of the treaty of 1794, and concludes:

> "It follows, that in this view also, her title was completely confirmed, free from the taint of alienage; and that by the express terms of the treaty, it might lawfully pass to her heirs."[218]

The Court concluded that, as a British treaty could not operate to protect Venetian citizens, the title vested in the nieces. One will note that the constitutional provision is here applied both to a

[216] 4 Wheat., 453 (1819).
[217] Ibid., p. 462.
[218] Ibid., p. 464.

treaty made under the Confederation and to a treaty made under the Constitution.[219]

In Hughes *vs.* Edwards,[220] a bill in equity was filed by British subjects to recover a mortgage debt, or, in default of payment, to procure the sale of the mortgaged property. Among the defenses set up was that of alienage. This defense was disposed of by the Court as follows:

"This objection would not we think avail the appellants, even if the object of this suit was the recovery of the land itself, since the remedies, as well as the rights, of these aliens, are completely protected by the treaty of 1794."[221]

In Carneal *vs.* Banks,[222] a bill was filed praying the rescinding of a contract under which the respondent had agreed to convey certain land to complainant, on the ground that respondent had no title to said lands. The decree below was in favor of complainant. The various assignments of error were considered by the Supreme Court. One, based on the rescinding of the contract by the lower court by reason of a misdescription, was sustained, on the ground that such misdescription was not averred in the bill, and therefore not put in issue. The Court then continues:

"The alleged alienage of Lacassaign (through whom respondent derived title) constitutes no objection. Had the fact been proven, this Court decided, in the case of Chirac *vs.* Chirac (2 Wheat. 259), that the treaty of 1778 between the United States and France, secures the citizens and subjects of either power the privilege of holding lands in the territory of the other."[223]

[219] Of this case Professor Mikell says: "Here again the treaty in question was a treaty negotiated by the Continental Congress, not by the Senate and the President. And again the power of Congress, or of the President and Senate to make such treaty, does not appear to have been argued by counsel, nor was it discussed by the Court," pp. 542–3. On the first point, he is wrong: both treaties were construed. The second argument needs no further comments. As a matter of fact, counsel in opposition to the force of the treaties did not appear to argue the case in the Supreme Court.

[220] 9 Wheat., 489 (1824).

[221] Ibid., p. 495. Professor Mikell says of this case: "Again the question of power was not argued by counsel or examined by the Court," p. 543. The report of the case gives the name of counsel but purports to add nothing concerning the argument.

[222] 10 Wheat., 181 (1825).

[223] Ibid., p. 189.

The decree was reversed without prejudice. The language of Mr. Chief Justice Marshall is not properly to be called *dicta*. If a good ground for rescission appeared in the record, reversal would not have been proper, even though the court below had placed its decision on the wrong ground. And the reference to the fact of alienage not being proved, is immaterial; it was alleged and might have been proved on the second trial.

The case of Worcester *vs.* The State of Georgia[224] is one of both historical and constitutional importance. The Creek and Cherokee Indians occupied territory within the State of Georgia under a series of treaties recognizing their rights to such territory. The State determined to acquire these Indian lands. By its governor, supported in large measure by the legislature, it was maintained that the sovereign rights of the State of Georgia absolutely forbade any Federal interference with the expulsion of the Indians, although such expulsion were contrary to the treaty provisions. An individual had committed a murder within the Indian territory, and had been convicted in the State court, and condemned to death. A writ of error was issued by the Supreme Court of the United States. This was disregarded, and sentence was executed. Under this existing situation the case of Worcester *vs.* The State of Georgia reached the Supreme Court. The decision rendered therein established the jurisdiction of the Supreme Court of the United States to examine on writ of error the criminal process of a State and to set free a person convicted under the laws of that State on the ground that such laws were repugnant to the Constitution, laws, and treaties of the United States. Above all, it determined that treaties with Indian tribes came within the constitutional powers. It has significance for us here. The Cherokee Indians occupied a portion of Georgia. The State passed an act forbidding any one under criminal penalties to reside in that land without a license from the governor of the State or his agent. Worcester was indicted under this act. He pleaded the provision of the treaties of the United States with the Indians and of an Act of Congress, and that the Georgia statute was unconstitutional and void, being in conflict therewith. His con-

[224] 6 Peters, 515 (1832).

viction was sustained in the State court. The Supreme Court of the United States reversed and ordered his discharge. Said Mr. Chief Justice Marshall:

"The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. . . .

"Will these powerful considerations avail the plaintiff in error? We think they will. He was seized, and forceably carried away, while under guardianship of treaties guaranteeing the country in which he resided, and taking it under the protection of the United States. He was seized while performing, under the sanction of the chief magistrate of the Union, those duties which the humane policy adopted by Congress had recommended. He was apprehended, tried, and condemned, under colour of a law which has been shown to be repugnant to the Constitution, laws, and treaties of the United States. Had a judgment, liable to the same objections, been rendered for property, none would question the jurisdiction of this Court."[225]

Mr. Justice McLean concurred and said:

"It has been shown, that the treaties and laws referred to, come within the due exercise of the Constitutional powers of the Federal government; that they remain in full force, and consequently must be considered as the supreme laws of the land. . . . Under the administration of the laws of Georgia, a citizen of the United States has been deprived of his liberty; and, claiming protection under the treaties and laws of the United States, he makes the question, as he has a right to make it, whether the laws of Georgia, under which he is now suffering an ignominious punishment, are not repugnant to the Constitution of the United States, and the treaties and laws made under it. This repugnancy has been shown."[226]

No recognition was given to the mandate of the Supreme Court upon its return to the State Court. That court refused to grant the writ of *habeas corpus* and Worcester continued in imprisonment. Not the slightest action was taken to enforce the mandate, or to punish its violation by either President Jackson or by Congress.[227] The explanation of this most dangerous precedent in the history of the United States is of course that it constitutes one of the series of constitutional violations springing from extreme States' rights doc-

[225] Ibid., pp. 559, 562.

[226] Ibid., p. 595.

[227] "Constitutional History of the United States," 1750–1833, von Holst, pp. 452–5.

trines which had their end in the Civil War. This case, however, has full and controlling authority as constitutional precedent today.

Many years passed before the effect of treaties upon State laws respecting inheritance again came before the Supreme Court. Accordingly, in Hauenstein *vs.* Lynham,[228] decided in 1879, the Court carefully reviews the preceding cases. Therein, a resident of Virginia, but presumably a citizen of Switzerland, had died intestate. The claimants were admittedly aliens. The Virginia court held against their claims on the ground that the provisions of the treaty with Switzerland did not, properly construed, operate to change the Virginia law, which barred the right of aliens to inherit. The Supreme Court held that this was an error in construction, and that the treaty did so operate. The Court said:

"It remains to consider the effect of the treaty thus construed upon the rights of the parties. That the laws of the State, irrespective of the treaty would put the fund into her coffers, is no objection to the right or the remedy claimed by the plaintiffs in error. The efficacy of the treaty is declared and guaranteed by the Constitution of the United States. That instrument took effect on the 4th day of March, 1789."[229]

The Court then quotes with approval[230] the language and the decisions in Ware *vs.* Hylton, Chirac *vs.* Chirac, Carneal *vs.* Banks, Hughes *vs.* Edwards, and Orr *vs.* Hodgson; and concludes thus:

"We have no doubt that this treaty is within the treaty-making power conferred by the Constitution, and it is our duty to give it full effect."[231]

In the case of Maiorano *vs.* B. & O. R. R. Co.,[232] the Supreme Court of Pennsylvania had held that the proper construction of an Act of that State providing that a right of action in favor of relatives should exist for damages for death by negligence did not extend its benefits to alien relatives. On appeal to the Supreme Court of the United States, that Court said:

"The only question for our decision is whether a proper interpretation and effect were allowed to the treaty.

"We do not deem it necessary to consider the constitutional limits of the treaty-making power. A treaty, within those limits, by the express words of

[228] 100 U. S., 483 (1879).
[229] Ibid., p. 488.
[230] See note 13.
[231] Ibid., p. 490.
[232] 213 U. S., 268 (1909).

the Constitution, is the supreme law of the land, binding alike National and State Courts, and is capable of enforcement, and must be enforced by them in the litigation of private rights. . . .

"We put our decision upon the words of the treaty. By a fair interpretation of them, did they directly confer upon the plaintiff the right which she seeks to maintain? We are of the opinion that they did not."[233]

Such is the unbroken series of cases decided by the Supreme Court of the United States, recognizing, stating, and enforcing the absolute supremacy of treaty provisions over State laws. No case has ever in the history of the United States been decided, which holds, for any reason or under any conditions a treaty provision to be subordinate to a State law or State right.

IV.

There remains, however, for consideration all that has been said or suggested in the way of possible or contingent limitations of the treaty-making power in favor of State rights. In this connection must be considered, first, the language of Mr. Chief Justice Taney in Prevost *vs.* Greneaux[234] and a curious statement by the same judge in Frederickson *vs.* Louisiana; and second, all that has been urged respecting the immunity of the so-called police power of the States from Federal control.

Prevost *vs.* Greneaux came before the Supreme Court in 1856. In 1848 one Francois Marie Prevost, a citizen of Louisiana, died, leaving a large estate. By the existing laws of that State a tax of ten per cent. was imposed on all property inherited by aliens not domiciled in Louisiana. In 1853 a treaty with France became effective providing:

"In all the States of the Union whose laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possession personal and real property by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously or for value received, by donation, testament, or otherwise, just as those citizens themselves; and in no case shall they be subjected to taxes on transfers, inheritance, or any others, different from those paid by the latter, or to taxes which shall not be equally imposed."

[233] Ibid., pp. 272–3.

[234] 19 How., 1 (1855).

In 1854 Jean Louis Prevost, a French subject residing in France, claimed as sole heir and proved his right. The State Supreme Court held

"that the right to the tax was complete, and vested in the State upon the death of Francois Marie Prevost, and was not affected by the treaty with France subsequently made."

In affirming the judgment, Mr. Chief Justice Taney said:

"We can see no valid objection to this judgment. . . . If the property vested [as was admitted] in him [the heir] at that time [the death of the decedent], it could vest only in the manner, upon the conditions authorized by the laws of the State. And, by the laws of the State, as they then stood, it vested in him, subject to a tax of ten per cent. payable to the State. And certainly a treaty, subsequently made by the United States with France, could not divest rights of property already vested in the State, even if the words of the treaty had imported such an intention. But the words of the Article, which we have already set forth, clearly apply to cases happening afterwards—not to cases where the party appeared after the treaty, to assert his rights, but to cases where the right afterwards accrued. And so it was decided by the Supreme Court of the State, and we think, rightly."[235]

There can be no question but that the remarks of Mr. Chief Justice Taney are directly contrary to the decision in Ware *vs.* Hylton.[236] Whether he recognized it to be so, inasmuch as he did not refer to that case, is questionable. But if the analysis heretofore made have any weight, it has been shown that the constitutional provision when inserted was intended to have a retroactive force, and was in Ware *vs.* Hylton given the significance and efficacy advocated by its framers and contemporary interpreters. The failure of Mr. Chief Justice Taney to appreciate the persuasive quality of the logic of that case and its binding force is characteristic of his political attitudes. His words, however, are rendered negligible by the later opinion of the Court in Hauenstein *vs.* Lynham, wherein the decision in Ware *vs.* Hylton is specifically approved and reaffirmed.

"It will be observed," said the Court, "that the treaty-making clause is retroactive as well as prospective. The treaty in question, in Ware *vs.* Hyl-

[235] Ibid., p. 7.

[236] It is also interesting to note that in Geofroy *vs.* Riggs, 133 U. S., 256 (1889), *infra* pages 75–6, the interpretation placed by the Court in a fully reasoned opinion on this French treaty of 1853 is wholly at variance with that of Mr. Chief Justice Taney.

ton, was the British treaty of 1783, which terminated the War of the American Revolution. It was made while the Articles of Confederation subsisted. The Constitution, when adopted, applied to treaties 'made and to be made.'"[237]

In Frederickson *vs.* Louisiana[238] the facts are immaterial to this discussion, but the Court after disposing of the case on other grounds, said:

"It has been suggested in the argument of this case, that the government of the United States is incompetent to regulate testamentary dispositions or laws of inheritance of foreigners, in reference to property within the States

"The question is one of great magnitude, but it is not important in the decision of this cause, and we consequently abstain from entering upon its consideration."[239]

In view of the long series of cases already decided, which have been analyzed above, these statements are surprising. The later case of Hauenstein *vs.* Lynham, however, deprives them of practical significance.

In Holmes *vs.* Jennison,[240] decided in 1840, we have voiced by Mr. Justice Baldwin that idea which has since been welcome to many: namely, that the treaty-making power is subject to what is called the police power of the State.

"It is but a poor and meager remnant of the once sovereign power of the States, a miserable shred and patch of independence, which the Constitution has not taken from them, if in the regulation of its internal police State sovereignty has become so shorn of authority, as to be competent only to exclude paupers, who may be a burden on the pockets of its citizens; unsound, infectious articles, or diseases which may affect their bodily health; and utterly powerless to exclude those moral ulcers on the body political, which corrupt its vitals and demoralize its members. If there is any one subject on which this Court should abstain from any course of reasoning, tending to expand the granted powers of the Constitution, so as to bring internal police within the law of treaty-making power of the United States, by including it within the prohibition on the States, it is the one now before us. Nay, if such construction is not unavoidable, it ought not to be given; lest we introduce into the Constitution a more vital and pestilential disease than any principle on which the relator could be rescued from the police power of Vermont, would fasten on its institutions, dangerous as it might be, or injurious its effects."[241]

We have in these words expressed in its most enthusiastic form,

[237] 100 U. S., p. 489.
[238] 23 How., 445 (1859).
[239] Ibid., p. 448.
[240] 14 Peters, 540 (1840).
[241] Ibid., p. 618.

the doctrine of the supremacy of the State police power. It had been more briefly enunciated in an earlier case, however, in which no reference was had to the treaty power. In New York *vs.* Miln[242] the Court said:

"We choose rather to plant ourselves on what we consider impregnable positions. They are these: . . . That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive."[243]

In the so-called License Cases[244] the States of Massachusetts, Rhode Island and New Hampshire had passed statutes in the nature of prohibition acts. Under them convictions had been had, which were sustained in the Supreme Court. It was urged that the Acts were unconstitutional attempts to regulate commerce and were in conflict with treaty stipulations; they were defended as having been passed in the exercise of the State police power. In the Rhode Island case, the brandy purchased by the indicted defendant was in the original package in which it had been imported from France. It was unanimously held that the State laws were all constitutional, and that the treaties did not by their proper construction apply. Six justices delivered opinions, differing from one another in the reasons adduced for sustaining the constitutionality of the Acts. And in subsequent opinions they again differed as to what were or what were not the *rationes decidendi* of the case. From those opinions may be collected expressions of belief in the supremacy of State police powers. Said Mr. Justice McLean:

"The Federal government is supreme within the scope of its delegated powers, and the State governments are equally supreme in the exercise of those powers not delegated by them nor inhibited to them. From this it is clear, that while the supreme functions are exercised by the Federal and State governments within their respective limitations, they can never come in conflict. And when a conflict occurs, the inquiry must necessarily be, which is the paramount law. . . .

"When in the appropriate exercise of these Federal and State powers, contingently and incidentally their lines of action run into each other; if the State power be necessary to the preservation of the morals, the health, or safety of the community, it must be maintained."[245]

[242] 11 Peters, 102 (1837).
[243] Ibid., p. 139.
[244] 5 How., 504 (1847).
[245] Ibid., pp. 587, 592.

Said Mr. Justice Daniel:

"Laws of the United States in order to be binding, must be within the legitimate powers vested by the Constitution. Treaties, to be valid, must be made within the scope of the same powers; for there can be no 'authority of the United States,' save what is derived mediately or immediately and regularly and legitimately from the Constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of any citizen of a State."[246]

Mr. Justice Grier repeated the quotation from New York *vs.* Miln, already given above,[247] and concluded:

"If the right to control these subjects be 'complete, unqualified, and exclusive' in the State legislatures, no regulations of secondary importance can supersede or restrain their operations, on any ground or prerogative or supremacy. The exigencies of the social compact require that such laws be executed before and above all others."[248]

Two years later, in the so-called Passenger Cases,[249] there were declared unconstitutional, statutes of New York and Massachusetts attempting *inter alia* to levy a tax on every alien coming into the state, although the proceeds of that tax were declared to be for the purpose of creating a fund for charitable purposes connected with immigration. Four judges dissented. From their opinions additional expressions of the inviolability of the State police power may be gathered. Said Mr. Chief Justice Taney:

"The first inquiry is, whether under the Constitution of the United States, the Federal government has the power to compel the several States to receive and suffer to remain in association with its citizens, every person or class of persons whom it may be the policy or pleasure of the United States to admit. . . . If the people of the several States of this Union reserved to themselves the power of expelling from their borders any person, or class of persons, whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of Congress invading this right and authorizing the introduction of any person for description of persons against the consent of the State would be an usurpation of power which this Court could neither recognize nor enforce.

"I had supposed this question not now open to dispute."[250]

[246] Ibid., pp. 612–3.
[247] *Supra*, p. 169.
[248] 5 How., p. 632.
[249] 7 How., 283 (1849).
[250] Ibid., pp. 465–6.

Said Mr. Justice Daniel:

"Admitting this Fourteenth Article of the treaty to be in full force, and that it purported to take from the State of New York the right to tax aliens coming and commorant within her territory, it would be certainly incompetent for such a purpose, because there is not, and never could have been, any right in any other agent than her own government to bind her by such a stipulation."[251]

Said Mr. Justice Woodbury:

"Measures which are legitimately of a police character are not pretended to be ceded anywhere in the Constitution to the general government in express terms: and as little can it be argued that they are impliedly to be considered as ceded, if they be honestly and truly police measures."[252]

Before examining into the circumstances under which the above expressions of *judicial opinion* have occurred and into the question how far the development of constitutional law has sanctioned or refuted their authority, it may be well to summarize the conclusions from our detailed analysis of *decisions*. These fundamental conclusions are three in number:

First: That a treaty provision having such expressed intention, will of its own force, operate as a Federal legislative act, and that this principle obtains even though the subject of the treaty provision be one committed by the Constitution to the legislation of Congress;

Second: That acts of Congress and treaty provisions stand under the Constitution on an equal footing, and that the last expression of the Federal will, be it by statute or by treaty, must prevail;

Third: That treaty provisions may deal with subjects not committed to the legislation of Congress, and that, when so declaratory of the Federal will, they operate of their own force to annul the constitution or law of any State in conflict therewith.

The question presented is, whether an exception exists to the third conclusion, and specifically, whether it be true that treaty provisions conflicting with the exercise of its police power by a State, are beyond the power of the Federal government, and consequently invalid. That question at perhaps tedious length but with an effort toward complete analysis we will now attempt to determine.

[251] Ibid., p. 507.
[252] Ibid., p. 524.

There is, however, a preliminary point which should be elucidated. It will have been observed that while considering the series of cases illustrating and establishing the supremacy of treaty provisions over State laws, the effect of the Tenth Amendment to the constitution was not considered. It has, however, been made of much importance by those who have advocated the supremacy of State rights, which rights they have called by virtue of this amendment, "the reserved rights of the States." The amendment is in these words:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

At the time of analyzing the cases referred to, this amendment was purposely not discussed because it was deemed to be wholly immaterial. The constitutional debates, and the political literature of that day show conclusively that the authors of the Constitution regarded the Federal government as one essentially of enumerated powers, apart from any and all amendments. The Tenth was adopted merely as declaratory of the interpretation which must properly in all events have been given to the Constitution, and to free the minds of certain persons who considered that the agreement of all parties that the Federal government was one of enumerated powers only, should be placed beyond the possibility of future and wrongful breach. It was considered to have, and it did have, no repealing or modifying force on the provisions of the Constitution itself. Throughout the debates, Federal and State, leading to the adoption of the Constitution or looking toward its amendment, one may search in vain for any suggestion that the limitations therein provided had any reference to the treaty power. The very language of the amendment would seem to establish this fact. What are the powers reserved to the States thereby? "The powers," first, says the amendment, "not delegated to the United States," and second, adds the amendment, not "prohibited by it to the States." Now, by the Constitution the power to make treaties is specifically granted to the Federal government in the Second Section of the Second Article, and specifically prohibited to the States by the Tenth Section of the First

Article. A mediaeval theologian alone—and his logic is not the kind used today—could demonstrate that with both exceptions named in the amendment specifically existing, such amendment was none the less effective in limitation of the treaty-making power. The reserved rights of the States are necessarily and by virtue of the very words of the Tenth Amendment, those rights which remain after the grant, first, of the treaty-making power, and, second, of the power to Congress to legislate upon certain subjects. The Tenth Amendment, therefore, leaves the treaty-making power of the United States unaltered and precisely as granted by the Constitution.

The most cursory examination of the judicial opinions quoted above on the supremacy of State police power, shows that this supremacy was maintained alike over treaty provision and act of Congress. No superior efficacy is claimed for act of Congress or for treaty. It is Federal supremacy which is challenged, and the manner of its manifestation is indifferent. It must of necessity be so; for in the Sixth Article of the Constitution "the laws of the United States which shall be made in pursuance" of the Constitution, and "all treaties made, or which shall be made, under the authority of the United States" are placed on equal footing, and given the same efficacy. The treaty power may deal with subjects which have been the subjects of congressional legislation; it may deal also with subjects beyond the legislation of Congress. But the question is not one of the *extent* of the treaty-making power, or of congressional action; that is determined; the treaty-making power must act upon subjects properly and customarily the subjects of treaty; congressional action must be within the constitutionally delegated powers. The question is essentially one of the *effectiveness* of treaty provision or of act of Congress when in conflict with State police power; and no more efficacy and no less can be claimed for treaty provision than for act of Congress. Inasmuch as the doctrine that the police power is an inviolable attribute of State sovereignty, and beyond the sphere of activity of Federal treaty and Federal law alike, it is essential that any analysis of the subject should extend to both manifestations of Federal activity. What is true of the *effectiveness* of one is inevitably true of the *effectiveness* of the other.

Attempts at defining the term police power have been many. We should not, however, be here tempted to essay it; for our object rather is to understand how the term has been used by others, and diversely indeed has it been used. In order to carry in mind, while reviewing the language of the courts, the various significations attached to the term, it will be well to indicate several. From one point of view—a view sanctioned by the etymological and probably historical origin of the term—the meaning given is equivalent to that of *municipal law;* all that body of law which we have come to regard as *local,* in contradistinction to what we conceive is properly national or international law. Again, viewing the subject from the peculiar point of view of the constitutional student, the term has been used, sometimes by members of the judiciary, to comprise no more and no less than the reserved powers of the States. The difficulty with this view is that it affords no means whatever of identifying those powers, but only gives to them a new name. Thirdly, the police power is said to be that power which provides for the public safety and welfare. This is perhaps the most popular view, but the difficulty is that almost any measure appropriate to be adopted, can be justified as intended to further the public welfare.

Examining into the development of the use of the term, one notes in the Federal Constitutional Convention that a resolution was proposed and rejected giving to Congress the power "to make laws binding on the people" of the United States "in all cases which may concern the common interests of the Union; but not to interfere with the government of the individual States in any matters of *internal police* which respect the government of such States only, and wherein the general welfare of the United States is not concerned."[253] Again, on the day when the Convention adjourned, a motion was made and defeated to insert in the Constitution a proviso "that no State shall, without its consent, be affected in its *internal police,* or deprived of its equal suffrage in the Senate."[254] In 1824, the great constitutional case of Gibbons *vs.* Ogden[255] was

[253] Farrand, Vol. II., p. 21.
[254] Ibid., p. 630.
[255] 9 Wheat., 1 (1824).

decided, and therein the conception of the State police power was further developed and elucidated. The question at issue was the validity of an Act of New York granting to Fulton and another exclusive rights to navigate the waters of the State in vessels propelled by fire or steam. It had been argued that the cases sustaining State statutes of quarantine were readily distinguishable. In reply to this argument, counsel argued as follows in support of the State law:

"The quarantine laws further illustrate our position. The appellant's counsel says, these are to be considered merely as laws of police; they are laws of police, but they are also laws of commerce; for such is the nature of that commerce, which we are told must be regulated exclusively by Congress, that it enters into, and mixes itself with, almost all the concerns of life."[256]

Mr. Chief Justice Marshall, in delivering the unanimous decision of the Court declaring the unconstitutionality of the New York law, so clearly and so logically stated the functions and status of the police powers of a State, that the subsequent confusion of thought upon this subject of so many judges must cause one to wonder at the possibility. It is, however, but one more illustration of the vagaries of interpretation to which fixed political convictions may lead even the judiciary. Said Mr. Chief Justice Marshall:

"Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the Constitution, the Court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an Act of Congress, and deprived a citizen of a right to which that Act entitles him. Should this collision exist, it will be immaterial, whether those laws were passed in virtue of a concurrent power 'to regulate commerce with foreign nations and among the several States,' or in virtue of a power to regulate their domestic trade and police. In one case and the other, the Acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous. This opinion has been frequently expressed in this Court, and is founded, as well on the nature of the government, as on the words of the Constitution. In argument, however, it has been contended, that if a law passed by a State in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by

[256] Ibid., p. 112.

Congress in pursuance of the Constitution, they affect the subject, and each other, like equal opposing powers. But the framers of our Constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it.

"The nullity of any Act, inconsistent with the Constitution is produced by the declaration, that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State legislatures as do not transcend their powers, but though enacted in the execution of acknowledged State powers, interfere with, or are contrary to, the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case, the Act of Congress or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."[257]

With this one decision and this one exposition of the relations between the Federal powers and the State police power, a complete understanding of the subject might well begin and end. But as an historical review is essential here, we may carry with us Marshall's words in somewhat the fashion that Matthew Arnold advised the student of poetry to store up in his mind the great utterances of great poets to serve as an infallible test.

Brown *vs.* Maryland,[258] another great constitutional case, was decided in 1827. The State statute had required all importers of foreign goods and all persons selling the same to take out a license. The statute was held unconstitutional, and imported articles were said to remain articles of commerce free from State legislation and subject only to the power of Congress to regulate commerce, so long as they remained in the original unbroken packages in which they were shipped. In the course of his opinion Mr. Chief Justice Marshall said:

"The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains and ought to remain, with the States. . . . We are not sure, that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a State."[259]

[257] Ibid., pp. 209–11.
[258] 12 Wheat., 419 (1827).
[259] Ibid., p. 442.

John Marshall died in 1835, and within less than two years after his death the case of New York *vs.* Miln[260] was decided. The State had enacted, first, that the master of every vessel arriving in New York should make a report in writing of all passengers whom he had landed, or who had departed from his vessel with a view to subsequently reaching New York; and secondly, that the master of such vessel should give bond for each passenger or child thereon that none should become a charge on the city. Said the Court:

"We are of opinion that the Act is not a regulation of commerce, but of police; and that being thus considered, it was passed in the exercise of a power which rightfully belonged to the State."[261]

Gibbons *vs.* Ogden and Brown *vs.* Maryland are formally approved and declared to be wholly consistent with the decision rendered; and in language already quoted, the Court say:

"All these powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*,[262] are not thus surrendered or sustained [by the Constitution]; . . . consequently, in relation to these, the authority of a State is complete, unqualified and exclusive."[263]

In so arguing, the Court fails to see that it is dangerously near to the logical fallacy: *petitio principii*. It will not logically do to say: The police powers belong to the reserved rights of the States—the act in question is an exercise of the police power—therefore it is constitutional. For it might well be that an act passed by a State under its power of "internal police" might operate to regulate commerce, entirely apart from the motives of its authors or the main object it subserved. As Mr. Chief Justice Marshall had simply, but with inspired penetration, said: The Federal power to regulate commerce "is co-extensive with the subject on which it acts and cannot be stopped at the external boundary of a State, but must enter its interior."[264] The question was not, could not be, whether the act in question was an exercise of the police power of the State. It might well be regarded, and properly, as such an act. The question was inevitably: Was the statute invalid, although an exercise of the police power, inasmuch as it infringed on the power of Con-

[260] 11 Peters, 10a (1837).
[261] Ibid., p. 132.
[262] Italics are in the opinion.
[263] 11 Peters, p. 239.
[264] 12 Wheat., p. 446.

gress to regulate commerce, and so was a part of the police power ceded by the States to the Federal government. The moment one defines the police power as equivalent to internal police, that moment the question of the constitutionality of a State statute becomes, not: Is the statute an exercise of the State police power? but: Does the exercise of the police power involve a conflict with powers given by the Constitution to the Federal government?

A portion of the opinion of Mr. Justice Baldwin in Holmes *vs.* Jennison has been quoted.[265] That case followed New York *vs.* Miln and contains as full and complete enunciation of the doctrine of the inviolability of State police power as exists. The action arose on the attempt made by the governor of Vermont to extradite the defendant to Canada. No treaty covered the case. The writ of error was dismissed for want of jurisdiction by a divided Court. But the difficulty with insisting on the validity of the views of Mr. Justice Baldwin therein contained as to the inviolability of State police powers, is that the opinion of Mr. Chief Justice Taney, and of the other justices who differed with Mr. Justice Baldwin,[266] has been the opinion to prevail in the history of constitutional law in the United States. To this effect was the decision in United States *vs.* Rauscher,[267] decided in 1886. Certainly, Mr. Justice Baldwin was right in thinking the act of the Governor of Vermont an exercise of State police power. But it was none the less violative of the Constitution. The true solution is that the police powers of a State are, like all other of its powers, subject to the controlling influence of all acts done in pursuance of the Federal Constitution. One cannot return too often to the language of Mr. Chief Justice Marshall in Gibbons *vs.* Ogden, where he said:

"In argument, however, it has been contended, that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject, and each other, like equal opposing powers. But the framers of

[265] *Supra*, pp. 167–169.

[266] A careful analysis of this case will demonstrate that Mr. Justice Baldwin's views were opposed to those of the majority of the court. On this ground, the Supreme Court of Vermont subsequently ordered the release of the prisoner—*Ex parte* Holmes, 12 Vermont, 631 (1840).

[267] 119 U. S., 407 (1886), *supra*, pp. 73–74.

our Constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it.

"The nullity of any act, inconsistent with the Constitution, is produced by the declaration, that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State legislatures as do not transcend their powers, but though enacted in the execution of acknowledged State powers, interfere with, or are contrary to, the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."[268]

The language of three of the members of the Court in the License Cases has already been quoted.[269] These cases require examination. In them were involved statutes of Massachusetts, Rhode Island, and New Hampshire, which were in the nature of prohibition acts. In the Rhode Island case the brandy purchased by the indicted defendant was in the original package in which it had been imported from France. All were held to be the constitutional exercise by the States of their police powers. These same constitutional questions came again before the Supreme Court in a series of cases culminating in that of Leisy *vs.* Hardin,[270] and therein this New Hampshire case was specifically disapproved and overruled. The decision was that a prohibition statute, as applied to sales by an importer from another State of liquors in the original packages, was unconstitutional. It is based upon the reasoning of Mr. Chief Justice Marshall in Gibbons *vs.* Ogden and Brown *vs.* Maryland, and concludes thus:

"As the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power without the assent of Congress, and, in the absence of legislation, it is left for the Courts to determine when State action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end."[271]

The decision is emphasized by the dissenting reasoning of Mr. Justice Gray, with whom concurred Mr. Justice Harlan and Mr. Justice Brewer. He argued that the State statute was an exercise of the police power, and that, while it might affect commerce, yet there

[268] 9 Wheat., pp. 210–1.
[269] *Supra*, pp. 170–172.
[270] 135 U. S., 100 (1890).
[271] Ibid., p. 119.

should not be inferred from the silence of Congress upon the subject any intention that commerce should be free from the operation of laws passed by a State in the exercise of its police powers. Consequently, until Congress acted, the State statute was valid. Said Mr. Justice Gray:

"The protection of the safety, the health, the morals, the good order and the general welfare of the people is the chief end of government. *Salus populi suprema lex.* The police power is inherent in the States, reserved to them by the Constitution, and necessary to their existence as organized governments. The Constitution of the United States and the laws made in pursuance thereof being the supreme law of the land, all statutes of a State must, of course, give way, so far as they are repugnant to the national Constitution and laws. But an intention is not lightly to be imputed to the framers of the Constitution, or to the Congress of the United States, to subordinate the protection of the safety, health and morals of the people to the promotion of trade and commerce."[272]

We have thus the unanimous acquiescence by the Court in the doctrine that whenever a conflict occurs between constitutional acts of the United States and State police powers operating upon the same subject, the State police power must yield. In other words, the police power of the States is subject to treaty provision and constitutional act of Congress.[273] And if one choose, this being true, to apply no longer the term police power to the source of the State's activity, the difference is one of words only. The thought of Mr. Justice Gray was the same which Mr. Chief Justice Taney had expressed in the License Cases.

"What are the police powers of a State?" asked Mr. Chief Justice Taney. He answered: "They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offenses, or to establish Courts of Justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same powers; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the Constitution of the United States. And when the validity of a State law making regulations of commerce is drawn into question in a

[272] Ibid., pp. 132, 158.
[273] See note 14.

judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the Court inquire whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade.

"Upon this question the object and motive of the State are of no importance, and cannot influence the decision. It is a question of power."[274]

Mr. Chief Justice Taney concluded in these License Cases that Congress had passed no law upon the subject, that the federal government had entered into no treaties, that *in their absence and only in their absence* the statutes were valid.

Certain of the judges in these License Cases, however, gave voice to opinions on the supremacy of the police power which we have already quoted.

"When in the appropriate exercise," said Mr. Justice McLean, "of these Federal and State powers, contingently and incidentally their lines of action run into each other; if the State power be necessary to the preservation of the morals, the health, or safety of the community, it must be maintained."[275]

Without grave qualification of his language, Mr. Justice McLean, as is seen in Leisy *vs.* Hardin, was wrong. The language of Mr. Justice Daniel is in itself unexceptional.[276] If he meant more than his words necessarily imply, and intended to convey the idea that treaty provisions and acts of Congress were arbitrary and void if they operated upon the police powers of the State, he was out of sympathy with the subsequent development of constitutional law, as illustrated in Leisy *vs.* Hardin, and his opinion has only an historical interest for us here. The lack of really authoritative force in his words may be gathered from this additional quotation from his opinion:

"The doctrines which to me appear to have been gratuitously brought into this case are those which have been promulgated in the reasoning of this Court in the case of Brown *vs.* The State of Maryland,—doctrines (and I speak it with all due respect) which I conceive cannot, by correct induction, be derived from the Constitution, nor even from the grounds assumed for their foundation in the reasoning of the Court in that case; but which, on the contrary, appear to be wholly illogical and arbitrary."[277]

[274] 5 How., p. 582.
[275] Ibid., p. 592.
[276] *Supra*, p. 170.
[277] 5 How., p. 611.

The language used by Mr. Justice Grier needs no extended comment.[278] Like that of Mr. Justice Daniel, it sprang from certain political convictions of the times, and has not been sanctioned by the development of constitutional law.

The opinions of the dissenting judges in the Passenger Cases[279] cannot be regarded as possessed of authoritative force. It was urged by them that a tax on every alien coming into a State port was a proper exercise of the police power beyond the control of the Federal government whether operating by act of Congress or by treaty provision, because the tax was devoted to charitable uses; in one case, a marine hospital; in the other, the support of foreign paupers. The judgments were against the constitutionality of the acts, and inasmuch as the whole current of constitutional law has since moved irresistibly in this direction, these dissenting opinions, like the majority of the others we have been considering, have only an historical interest. The kind of argument which was so popular and so potent during the period from John Marshall's death to the Civil War, whose coloring influence may be seen reflected in such opinions, is well exemplified in these Passenger Cases. Said counsel for New York of the State he represented:

> "She saw with unaffected concern the prodigious strides made by this power to regulate commerce towards engrossing and consolidating the power of the Union. This may well be regarded as the mastodon of construction, starting from this bench, and in its giant strides trampling upon the rights of the States and their sovereignty. Fortunately, it is only known to the present day by its colossal bones, scattered through the reports of the early opinions of members of this Court. Its march was arrested, its life terminated, in New York *vs.* Miln. The noble ground then assumed was maintained in the License Cases."[280]

A careful reflection upon the implications underlying these words, and upon the magnitude of interstate commerce today, will do much to put a just valuation upon the opinions of many of the judges who immediately succeeded John Marshall.

We thus reach the conclusion of an analysis of the decisions

[278] *Supra*, p. 171.
[279] 7 How., 282 (1849).
[280] Ibid., pp. 378–9.

upon the *effectiveness* of act of Congress and treaty provision when in conflict with an exercise of State police power. We have seen that they do *not* "affect the subject, and each other, like equal opposing powers"; but that the State police power, whatever be the definition or intendment of that term, must yield. So held John Marshall in Gibbons *vs.* Ogden, and such, after avowed aberration by some judges and covert disloyalty by others to the doctrine, is the law today. The cases, with the possible exception of the Passenger Cases, have been illustrations of conflict with act of Congress and not with treaty. But by the Sixth Article of the Constitution, and by its interpretation in Gibbons *vs.* Ogden, no distinction is drawn between their equal and controlling supremacy. This is confirmed by the long line of cases holding that between statute and treaty, the latest expression of the Federal will must prevail.[281] The logic itself of the situation admits of no distinction. Marshall had said of the power to regulate commerce:

> "The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior."

So necessarily must it be with the power to make treaties. Is it thinkable that that power may be "stopped at the external boundary of a State"? Aliens "must enter its interior," as commerce does; and the power of the United States to provide for such aliens by treaty must accompany them. In our review of the causes which led to the creation of the Sixth Article of the Constitution, of the purposes it was intended to subserve, of the interpretations placed upon it by contemporaries, it was seen as a universally admitted fact, that treaty provisions had been stopped at State boundaries, and it was accordingly provided that under the Constitution the treaty power should enter the interior of the States and there operate as a supreme manifestation of the Federal will. And this was the deliberate and reiterated judgment of the Supreme Court in the cases analyzed beginning with Ware *vs.* Hylton. If, in the definition of some lawyers, no State statute under examination in these cases was an exercise of the police power, we have none the less seen that the long list of cases beginning with Gibbons *vs.* Ogden and Brown *vs.* Mary-

[281] *Supra*, 83–99.

land, and ending with the echoes of the decision in Leisy *vs.* Hardin, established, beyond all possibility of controversy, the supremacy over State police power of the constitutionally expressed Federal will, whether manifest in act of Congress or in treaty. The language of the Supreme Court in certain cases arising out of State quarantine laws perhaps best presents its recent position in this regard. Thus, we have the following authoritative utterances:

"Definitions of the police power must, however, be taken, subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land."[282]

"While it [an alleged right of State regulation] may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this Court that, even where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail."[283]

"Generally it may be said in respect to laws of this character, that though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter; for that power, like all other reserved powers of the State, is subordinate to those in terms conferred by the Constitution upon the nation."[284]

We have seen that the inefficiency of the Federal will was the acknowledged weakness of the United States under the Articles of Confederation; that that weakness was appreciated and regretted by those who formed the Constitution; that the language used in that instrument was intended by them to secure the supremacy of the Federal will; and that the Supreme Court had interpreted it accordingly. It might seem that any possible discussion of the meaning of Article VI. was thus foreclosed. But it may be well to account for the doubts and questionings which have, as we have seen, reached even to the Supreme Court. There was no uncertainty in the mind or in the utterance of Mr. Chief Justice Marshall when Gibbons *vs.* Ogden was decided. Yet in that very case he had said:

[282] New Orleans Gas Co. *vs.* Louisiana Light Co., 115 U. S., 650 (1885), p. 661.

[283] Morgan *vs.* Louisiana, 118 U. S., 455 (1886), p. 464.

[284] Gulf, Colorado & Sante Fe Ry. Co. *vs.* Hefley, 158 U. S., 98 (1895), p. 104.

"It has been contended that if a law passed by a State in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other, like equal opposing powers."

Unsound that contention was declared by the Court to be. But it was in effect the contention of that powerful body which spoke through Calhoun, and which strove to dominate the Union. In the writings of that brilliant intellect, are concentrated the emotions, the reasoning, the political conceptions of the slavocracy. And in them we find an attempt at a logical basis for the doctrine we know as "State rights"—an attempt both able and sincere.[285] The States, he said, are sovereign; certain of their powers only they have delegated. All acts done by the Union beyond its delegated powers are void. It is for the States to differ from the Union with reluctance as to the exercise of such a power; but if they assert their difference, they assert it as a sovereign party to a treaty asserts its right to insist on its own interpretation. No jurisdiction lies in any Federal court, no power lies in any Federal agent, to overcome the declaration of the State, when it "nullifies" the Federal law. In the view of such a man and of the powerful party which supported him, the functions of State legislation expanded, and of Federal activities lessened. The Judiciary Act, so far as it allowed an appeal from the State Courts to the United States Supreme Court, he declared to be unconstitutional.[286] And when the tariff act of 1832 was "nullified" by South Carolina in a declaration written by Calhoun,[287] at the time vice-president of the United States, Congress hastened to compromise. Is it strange that with such ideas obtaining credence in so many minds, hesitation existed on the part of some to declare the apparent meaning of Article VI. of the Constitution to be the real meaning; that the term "police power of the States" conveyed an illusory accent of authority; and the declarations of Federal will received a qualified and timid adherence? The mandate of the

[285] See "A Discourse on the Constitution and Government of the United States," Calhoun's Works, Vol. I., p. 111. "Address to the People of South Carolina," Ibid., Vol. VI., p. 124. Letter to Governor Hamilton, Ibid., VI., p. 144.

[286] "A Discourse on the Constitution, Ibid., Vol. I., at p. 318, ff.

[287] "Address to the People of the United States," Ibid., Vol. VI., p. 193.

Supreme Court of the United States in Worcester *vs.* State of Georgia was insulted and ignored.[288] And the Federal government stood by silently assenting. Of that Federal government, Calhoun was vice-president, and Roger B. Taney, attorney general. With the death of John Marshall, that attorney general, a citizen of a slave State, was created the Chief Justice of the Supreme Court by the very President who had permitted Georgia to defy that Court. Is it a cause for wonder that doubt as to the supreme efficacy of treaty provision over State law crept into the Court over whom presided Mr. Chief Justice Taney? But today, a half-century after the Civil War, that doubt is a survival which, Professor Mikell must permit one to say, has no function to perform and has outlived its reason for existence.

V.

There is, however, a further consideration which lies before us. We have come to realize that, born in times of stress, and intended as a firm anchorage in future storms, the Constitution is pervaded and inspired by that intention. We have come to appreciate the memorable words of Marshall:

> "As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."[289]

We have seen the Supreme Court of the United States interpret the Sixth Article of the Constitution in accordance with the purposes for which it was adopted and the plain meaning of its words. To the candid and informed mind, the supremacy of treaty provision has been placed by those decisions beyond the region of controversy. But now the question becomes relevant: *Grant the supremacy, how is it to be enforced?* It is apprehended that a series of decided cases in the Supreme Court of the United States has determined all the applicable principles of constitutional law, and pointed out the methods by which is to be enforced any treaty provision.

[288] *Supra,* pp. 158–161.

[289] Gibbons *vs.* Ogden, 9 Wheat., p. 188.

But before we turn to the examination of these decisions, it may be well to consider certain of the incidents in the diplomatic relations of the United States in which has arisen the question of its power to enforce treaty provisions. It will not be attempted to examine these occurrences from the point of view of rights and liabilities under international law, but wholly with respect to the attitude taken by the Department of State toward the subject.

On November 10, 1880, certain Chinese residents of Denver, Colorado, were injured or killed and their property destroyed by a mob moved by race hatred. In reply to the representations of the Chinese minister, the Secretary of State, Mr. Evarts, said:

". . . As to the arrest and punishment of the guilty persons who composed the mob at Denver, I need only remind you that the powers of direct intervention on the part of this government are limited by the Constitution of the United States. Under the limitations of that instrument, the government of the Federal Union cannot interfere in regard to the administration or execution of the munipical laws of a State of the Union, except under circumstances expressly provided for in the Constitution. Such instances are confined to the case of a State whose power is found inadequate to the enforcement of its municipal laws and the maintenance of its sovereign authority; and even then the Federal authority can only be brought into operation in the particular State, in response to a formal request from the proper political authority of the State. It will thus be perceived that so far as the arrest and punishment of the guilty parties may be concerned, it is a matter which, in the present aspect of the case, belongs exclusively to the government and authorities of the State of Colorado."[290]

The Chinese minister replied:

"I regret to learn from your note that the powers of direct intervention on the part of the United States Government are limited by the Constitution. It appears to me that treaties as well as the Constitution, are the supreme law of this land. The Chinese residents who were subjected to the wanton outrage of the mob, came to this country, under the right of treaties between China and the general Government of the United States, and not with Colorado or any individual State.

"Thus, the case under consideration should be a question of intercourse between China and the United States, and different from that to be dealt with under the ordinary internal administration of a State. It was with this view that I had in my last note requested you to cause this case to be examined. But I fail to learn from your note the number of the guilty persons that have been arrested, and how they have been punished or dealt

[290] William M. Evarts to Chen Lan Pin, Foreign Relations, 1881, p. 319.

with, and how the general Government of the United States has exercised, or intends to exercise, its power in executing the treaty obligations to protect the Chinese."[291]

To this letter, Mr. Blaine responded:

"Your observations to the effect that treaties form a part of the supreme law of this land equally with the Constitution of the United States, is evidently based on a misconception of the true nature of the Constitution. That instrument, together with all laws which are made in pursuance thereof. and all treaties made or which shall be made under the authority of the United States, are the supreme law of the land. Such is the language of the Constitution, but it must be observed that the treaty no less than the statute law, must be made in conformity with the Constitution, and were a provision in either a treaty or a law found to contravene the principles of the Constitution, such provision must give way to the superior force of the Constitution, which is the organic law of the republic, binding alike on the government and the nation. It is under this interpretation of the Constitution that foreigners, no less than citizens, find their best guarantee for that security and protection in their persons and property which it is the aim and desire of the Government of the United States to extend to all alike."[292]

Here the matter ended. Exactly what idea, if any, Mr. Blaine intended to convey by his concluding sentences, is not clear.

On March 14, 1891, eleven Italians were killed by a mob in New Orleans, Louisiana, in a series of occurrences known as the Mafia riots. The chief of police had been previously murdered and his death was ascribed to the Mafia. The eleven Italians had been arrested on that charge, tried and acquitted. A mob thereupon killed them. Said the Secretary of State, Mr. Blaine:

"If it shall result that the case can be prosecuted only in the State Courts of Louisiana, and the usual judicial investigation and procedure under the criminal law is not resorted to, it will then be the duty of the United States to consider whether some other form of redress may be asked. It is understood that the State grand jury is now investigating the affair, and, while it is possible that the jury may fail to present indictments, the United States cannot assume that such will be the case.

"The United States did not by the treaty with Italy become the insurer of the lives or property of Italian subjects resident within our territory. No government is able, however high its civilization, however vigilant its police supervision, however severe its criminal code, and however prompt and inflexible its criminal administration, to secure its own citizens against violence promoted by individual malice or by sudden popular tumult. The foreign

[291] Chen Pan Pin to William M. Evarts, Ibid., p. 321.
[292] James G. Blaine to Chen Lan Pin, Ibid., p. 336.

resident must be content in such cases to share the same redress that is offered by the law to the citizen, and has no just cause of complaint or right to ask the interposition of his country if the Courts are equally open to him for the redress of his injuries."[293]

This case caused the greatest excitement in both countries, and the Italian minister was withdrawn. The international obligations of the United States were finally settled by an appropriation by Congress as indemnity. This course had been adopted in the Chinese riots at Denver, and has been followed in practically all of the instances of damages to or killing of aliens by mob violence.

The Act of Congress has always included a clause to the effect that the indemnity is allowed out of considerations of humanity and without reference to questions of liability.

In 1899, a mob hanged five Italians at Tallulah, Louisiana. The Italian government protested. The local grand jury failed to indict, although the facts were notorious. The Federal government indemnified the families of the victims. The incident has interest as it manifests the foreign estimate of the position of powerlessness assumed by the Federal government. The minister of the United States to Italy forwarded to the Secretary of State an extract from a newspaper printed at Rome, and said of it that it represented fairly public opinion.[294] Said the editorial article:

"A number of our confrères are astonished that in the face of a fact so abominable as the lynching of four or five human beings, it should not be possible for either to claim, or obtain, a more substantial reparation than the payment of an indemnity, more or less large, to the families of the victims. Nevertheless this is the fact, and all protests against it would be futile.

"The Constitution of the United States gives the President of the Republic no power over the internal affairs of the different States. The Governor of Louisiana has no account to render to the President of the Confederation in regard to what takes place in his State. The Governor is as powerful at home as the President is at Washington. Louisiana has its laws, its magistrates, its parliament, its customs, and if President McKinley should seek to impose his will upon it, he would receive a peremptory refusal, and not only that, but he would raise up against him the whole public opinion of America. This American Constitution is, without doubt an anomaly, above all from the European point of view. It is difficult to admit that a State should not be able to answer for the acts which take

[293] James G. Blaine to Marquis Imperiali, Foreign Relations, 1891, p. 685.
[294] Foreign Relations, 1899, p. 445.

place under the shadow of its flag. All idea of reciprocity, which is the basis of good relations, falls in prices.[295] If in a small village of Lombardy, or Piedmont, an American had been outraged, or killed unjustly, it is the Government at Rome that would have to answer for it. It is therefore incomprehensible that the Washington Government should not do the same when an Italian is injured in Louisiana or Ohio."[296]

In the case of the rights of Japanese in California in their relation to the public schools, the question took on aspects which had not hitherto characterized it. The case was not one arising out of mob violence but involved the deliberate acts of the State of California, or rather of a board of education deriving its powers from that State. There were several questions with respect to the applicability of the Japanese treaty, and its proper construction. In their essence, these questions were whether the board of education had the right under the existing treaty to tax all alien residents for school purposes, and then to direct that Japanese children must attend only one school—the Oriental school—while all other schools were open to children of other alien residents. Assuming the applicability of the treaty and its violation by the State authorities, the fundamental question was thus presented as to the validity of the treaty, and if valid, the possible methods of its enforcement. The United States government filed a bill in the Federal court in California to enforce the treaty; but the matter was adjusted, and the case discontinued, because of the rescinding of the resolution of the board of education, which had given rise to the controversy.[297] In the meantime, the then President of the United States, Mr. Roosevelt, had, impliedly disapproving the prior positions assumed by the State Department under Mr. Evarts and Mr. Blaine, thus addressed Congress in his annual message of 1906:

"I therefore earnestly recommend that the criminal and civil statutes of the United States be so amended and added to as to enable the President, acting for the United States government, which is responsible in our international relations, to enforce the rights of aliens under treaties. Even as the law now is, something can be done by the Federal government toward this end, and in the matter now before me affecting the Japanese, everything that

[295] *Sic.* Evidently a translation of *baisser le prix.*

[296] Clipping from *L'Italie* of July 25, 1899.

[297] See note 15.

it is in my power to do will be done, and all the forces, military and civil, of the United States which I may lawfully employ will be so employed. There should, however, be no particle of doubt as to the power of the National Government completely to perform and enforce its own obligations to other nations. The mob of a single city may at any time perform acts of lawless violence against some class of foreigners which would plunge us into war."[298]

This recommendation did not result in the passage of any statute upon the subject. Similar recommendations by President Harrison in 1891,[299] and by President McKinley in 1899[300] and 1900[301] were likewise disregarded by Congress.

There are at least two instances in our foreign relations where the wrong was done to those claiming the protection of the Federal government, and the position taken is instructive.

The first occurred in 1853 and is known as the Martin Koszta Case.[302] Koszta was a native of Hungary but had declared his intention of becoming a citizen of the United States. While in Turkey on business, and protected by a certificate of the United States consul issued in accordance with Turkish law, he was seized by command of the Austrian consul-general and carried on board an Austrian vessel. A sloop of war of the United States was in the harbor and its captain demanded his release. After some dispute, he was surrendered into the custody of the French consul to await the result of the diplomatic action of Austria and the United States. The United States persisted in its demand, and Koszta was released. In in re Neagle[303] the Court, approving of this action of the United States, ask of this case:

"Upon what act of Congress then existing can any one lay his finger in support of the action of our government in this matter?"[304]

And the dissenting members of the Court, likewise approving the action of the United States, say:

[298] *Congressional Record,* Vol. 41, Part II., p. 32.
[299] See note 16.
[300] See note 17.
[301] See note 18.
[302] Moore, *International Law Digest,* Vol. III., 490.
[303] 135 U. S., 1 (1890).
[304] 135 U. S., p. 64.

"We are asked:—Upon what express statute of Congress then existing can this act of the government be justified?

"We answer, that such action of the government was justified because it pertained to the foreign relations of the United States, in respect to which the federal government is the exclusive representative, and embodiment of the entire sovereignty of the nation, in its united character; for to foreign nations, and in our intercourse with them, States and state governments, and even the internal adjustment of federal power, with its complex system of checks and balances, are unknown, and the only authority those nations are permitted to deal with is the authority of the nation as a unit.

"That authority the Constitution vests expressly and conclusively in the treaty-making power . . . the President and Senate . . . by one simple and comprehensive grant: 'He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.' This broad grant makes enumeration of particular powers unnecessary. All other delegations of powers in reference to the international relations of this country are carefully and specifically enumerated and assigned, one by one, to their designated departments. In reply, therefore, to the question, what law expressly justifies such action, we answer, the organic law, the constitution, which expressly commits all matters pertaining to our diplomatic negotiations to the treaty-making power."[305]

In 1871 the steamer *Montijo* owned by citizens of the United States, was seized by certain persons who were desirous of accomplishing a revolution against the State of Panama.[306] Subsequently, the State of Panama granted amnesty to the revolutionists and assumed responsibility for damages done by them. The United States claimed damages from the United States of Colombia of which the State of Panama was a constituent part. The controversy was referred to the British consul as arbitrator. It was claimed by Colombia that no responsibility could rest on her for the acts of a revolution within the State of Panama or for the acts of that State, and that the constitution so provided. This claim was disallowed by the arbitrator who held that the treaty was

"made with the general government, and not with the separate States of which the Union is composed."

He concluded:

"In the event of the violation of a treaty stipulation, it is evident that a recourse must be had to the entity with which the international engagements

[305] Ibid., pp. 84–5.

[306] Moore, "International Arbitrations," Vol. II., pp. 1421–47.

were made. There is no one else to whom application can be directed. For treaty purposes the separate States are non-existent; they have parted with a certain defined portion of their inherent sovereignty, and can only be dealt with through their accredited representative or delegate, the Federal Government."[307]

It is now necessary to examine whether, under existing decisions of the Supreme Court, such statutes as have been recommended by three Presidents would be unconstitutional; and further, considering the suggestion of President Roosevelt, to ask what means of giving effectiveness to treaty provisions exist in the Federal government, in the absence of such statutory enactment.

In 1879 were decided three cases of great significance to us here. The first was Tennessee *vs.* Davis,[308] wherein the defendant was indicted in a State court for murder. Acting under Section 643 of the Revised Statutes of the United States, he petitioned the circuit court of the United States for removal of the prosecution to that court, alleging that the killing occurred in self-defence while he was acting as deputy collector of internal revenue by the authority of Federal laws. The question was raised as to the constitutionality of the statute. On appeal, the Supreme Court sustained its constitutionality and said:

"A more important question can hardly be imagined. Upon its answer may depend the possibility of the general government's preserving its own existence. As was said in Martin *vs.* Hunter (1 Wheat., 363), 'the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers.' It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection. —if their protection must be left to the action of the State court,—the operations of the general government may at any time, be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government. And even if, after trial, and final judgment in the State court, the case can be brought into the United States court for

[307] Ibid., p. 1439.
[308] 100 U. S., 257 (1879).

review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.

"We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in a number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it."[309]

In *ex parte* Siebold,[310] certain election officers appointed under the laws of Maryland were convicted in the circuit court of the United States of interfering with the deputy marshals of the United States who were acting under Federal statutes at a congressional election. The convictions were sustained and the statutes declared to be constitutional. The Court concluded:

"The views we have expressed seem to us to be founded on such plain and practical principles as hardly to need any labored argument in their support. We may mystify anything. But if we take a plain view of the words of the Constitution, and give to them a fair and obvious interpretation, we cannot fail in most cases of coming to a clear understanding of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths of speculation.

"The greatest difficulty in coming to a just conclusion arises from mistaken notions with regard to the relations which subsist between the state and national governments. It seems to be often overlooked that a national government has been adopted in this country, establishing a real government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his State government is. Whenever the true conception of the nature of this government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the State governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. . . . State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But, in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other."[311]

[309] Ibid., pp. 262–3.
[310] Ibid., 371 (1879).
[311] Ibid., pp. 393–4.

Ex parte Clarke[312] arose in Ohio and involved constitutional questions similar to those decided in *Ex parte* Siebold. It is distinguished by a strong dissenting opinion by Mr. Justice Field.

These three cases present precisely and completely the doctrine they enunciate. On the one hand, Tennessee *vs.* Davis determines the *ineffectiveness* of State laws when attempted to be enforced against Federal laws; on the other hand, *Ex parte* Siebold illustrates the *effectiveness* of Federal law when opposed to State law. Such are the decisions in cases where *crimes* were charged and *criminal proceedings* begun. However the definition of the State police power be narrowed, it must include its agencies for the defining and the punishment of crime. Yet, in the one case, the State was held powerless to try the party whom it had indicted, and in the other, powerless to save the party acting under its authority. And the Court fully appreciated the significance of its decision.

"It is argued," says the opinion of the Court, "that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

"This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield."[313]

In Baldwin *vs.* Franks,[314] the power of the Federal government to provide for the punishment of those who violate treaty provisions is unanimously enunciated in positive terms. The case, however, did not require the determination of this question, because the acts

[312] Ibid., 399 (1879).
[313] Ibid., pp. 394–5.
[314] 120 U. S., 678 (1878).

in question, under which the defendant had been prosecuted, were declared to be inapplicable. Said the Court:

"The precise question we have to determine is not whether Congress has the constitutional authority to provide for the punishment of such an offense as that with which Baldwin is charged, but whether it has so done.

"That the treaty-making power has been surrendered by the States and given to the United States, is unquestionable. It is true, also that the treaties made by the United States and in force are part of the supreme law of the land, and that they are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States. . . .

"That the United States have power under the Constitution to provide for the punishment of those who are guilty of depriving Chinese subjects of any of the rights, privileges, immunities, or exemptions guaranteed to them by this treaty, we do not doubt. What we have to decide, under the questions certified here from the Court below, is, whether this has been done."[315]

It will be observed that although the Court contemplated that it would be by act of Congress that the treaty rights would be protected, yet the authority in Congress to pass such an act could be derived only from the clause giving it the power generally to make all laws necessary for carrying into execution the treaty power.[316] And if the treaty power were incompetent to come into successful conflict with State police power, the act of Congress must logically have been equally powerless to carry into effect an unconstitutional treaty provision.

The foregoing cases, although they establish generally the *effectiveness* of Federal law when opposed to State law, without regard to so-called State police power, are cases where an act of Congress was under consideration. *In re* Neagle[317] illustrates the extent to which the Supreme Court has recognized and enforced the supremacy over State police power of Federal constitutional provisions. One Terry had been punished by Mr. Justice Field with imprisonment for contempt of court committed during the litigation before him. Terry had publicly announced his intention of taking Mr. Justice Field's

[315] Ibid., pp. 682, 683.

[316] Article I., Section 8, Last Clause. "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

[317] 135 U. S., 1 (1890).

life. The attorney-general had directed the United States marshal in California to use all possible means to prevent such a catastrophe. Neagle was appointed deputy marshal and instructed to attend upon Mr. Justice Field and endeavor to protect him from any assault by Terry. While the justice was traveling to attend court, such assault occurred, and Neagle shot and killed Terry. An arrest by the California authorities for murder followed. Neagle applied to the circuit court of the United States for a writ of *habeas corpus,* under which he was discharged. On appeal to the Supreme Court, that judgment was affirmed. The statute authorizing the granting of such a writ of *habeas corpus* provided that it should issue when the petitioner was "in custody for an act done or omitted in pursuance of a law of the United States." No statute existed which authorized the duties assumed by Neagle toward Mr. Justice Field. But said the Court:

"In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is 'a law' within the meaning of this phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably. . . . We do not believe that the government of the United States is thus inefficient, or that its Constitution and laws have left the high officers of the government so defenseless and unprotected."[318]

The Court then point out that by Article II., Section 3, of the Constitution, it is provided that the President "shall take care that the laws be faithfully executed"; and they ask:

"If an officer of the United States has been arrested on indictment found by a State Court, for riot, assault and battery, and assault with attempt to kill, the indictment now showing that the alleged offenses were committed while the officer was professing to act under a law of the United States, or under some order, process, or decree of some judge or Court thereof, this Court, on a habeas corpus, where the petition of the officer denies the offense, and avers that what is alleged as offense was done in proper execution of an order, process, or decree of a Federal Court, will *go outside the indictment,* and hear evidence to show the truth of the facts set forth by the officer."[319]

[318] Ibid., p. 59. [319] Ibid., p. 64.

The Court then refers to the international episode of the case of Martin Koszta, and asks:

"Upon what Act of Congress then existing can any one lay his finger in support of the action of our government in this matter?"[320]

The conclusion is that all acts done under the Constitution have the force of law.

In Logan *vs.* United States,[321] certain individuals were arrested for an alleged crime committed within the Indian territory, and therefore within the jurisdiction of the United States. While in the custody of the United States marshal, they were attacked by an armed body of men and a fight ensued, resulting in the death of two of the individuals under arrest. Sections 5508–9 of the Revised Statutes provided for the punishment of any two or more persons who should conspire and unite to deprive any person of a privilege secured to him by the Constitution or laws of the United States. Under these sections members of the attacking band were indicted in the Federal district court. The Supreme Court of the United States held that the United States was bound to protect against lawless violence persons in its custody under arrest; and that an attack upon persons so held constitute a violation of Sections 5508–9 of the Revised Statutes. Said the Court:

"Every right, created by, arising under or dependent upon, the Constitution of the United States, may be protected and enforced by Congress, by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object."[322]

It will be observed in this case that the jurisdiction of the United States over the subject matter arose out of the fact that the original crime was committed in the Indian Territory, and that regulations concerning it were committed to the legislation of Congress by the Constitution. Sections 5508–9 of the Revised Statutes, although general criminal statutes, were sustained because they were operative to protect rights secured by laws of Congress, passed in the

[320] Ibid., p. 64.
[321] 144 U. S., 263 (1892).
[322] Ibid., p. 293.

exercise of a power granted by the Constitution. Inasmuch as the power to make treaties is likewise specifically granted and such treaties are declared to have the force of laws, this case is of authoritative significance.

In re Debs[323] is a case which attracted universal interest. It arose out of the great Chicago strike of 1894, and was a petition for a writ of *habeas corpus* to secure the release of labor leaders sentenced for contempt. The legal points at issue were succinctly stated by the Supreme Court as follows:

"The United States, finding that the interstate transportation of persons and property, as well as the carriages of the mails, is forcibly obstructed, and that a combination and conspiracy exists to subject the control of such transportation to the will of the conspirators, applied to one of their Courts, sitting as a Court of Equity, for an injunction to restrain such obstruction and prevent carrying into effect such conspiracy. Two questions of importance are presented: First. Are the relations of the general government to interstate commerce and the transportation of the mails such as authorize a direct interference to prevent a forcible obstruction thereof? Second. If authority exists, as authority in governmental affairs implies both power and duty, has a Court of Equity jurisdiction to issue an injunction in aid of the performance of such duty"?[324]

The Court then proceeds to quote the language of Mr. Chief Justice Marshall in McCullough *vs.* Maryland:

"No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution."[325]

The two questions of law propounded are answered as follows:

"As, under the Constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and Congress by virtue of such grant has assumed actual and direct control, it follows

[323] 158 U. S., 564 (1895).
[324] 158 U. S., p. 577.
[325] 4 Wheat., p. 578.

that the national government may prevent any unlawful and forcible interference therewith. But how shall this be accomplished? Doubtless, it is within the competency of Congress to prescribe by legislation that any interference with these matters shall be offenses against the United States, and prosecuted and punished by indictment in the proper courts. But is that the only remedy? Have the vast interests of the nation in interstate commerce, and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? . . . There is no such impotency in the national government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws.

"But passing to the second question, is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce within or the transportation of the mails? Is the army the only instrument by which rights of the police can be enforced and the peace of the nation preserved? . . . The right to use force does not exclude the right of appeal to the Courts for a judicial determination and for the exercise of all their powers of prevention. Indeed, it is more to the praise than to the blame of the government, that, instead of determining for itself questions of right and wrong on the part of these petitioners and their associates and enforcing that determination by the club of the policeman and the bayonet of the soldier, it submitted all those questions to the peaceful determination of judicial tribunals, and invoked their consideration and judgment as to the measure of its rights and powers and correlative obligations of those against whom it made complaint."[326]

The Court thus concludes:

"Summing up our conclusions, we hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty."[327]

If therefore the Federal government has the power to act by its army, by its courts, criminal and civil, "directly upon each citizen" "over every foot of soil within this territory," under the grant to regulate interstate commerce and the transmission of the mail, can it be that the powers of that same Federal government are less whan

[326] 158 U. S., pp. 581, 582, 583.
[327] Ibid., p. 599.

called upon to perform sacred obligations incurred through treaties with other sovereignties? A dispassionate study of the cases—such as is here attempted—shows that the Federal government has full power to deal within a State with mobs who attack one under Federal arrest, and with mobs who interfere with interstate commerce. How long—such being incontrovertible law—will the American people permit its Department of State to urge that it is without power to deal with a mob which deliberately sets at naught and violates Federal treaty obligations declared by the Constitution to be the supreme law of the land?

Ohio *vs.* Thomas[328] is a case which by its facts throws into strong relief the incapacity of so-called State police power to affect the action of the Federal government. By Act of Congress a soldiers' home was established in the State of Ohio. It was conceded that the ground on which the home stood was within the jurisdiction of the State. The management of the home was entrusted by Congress to a governor and board of managers. By an Ohio statute the use of oleomargarine was permitted only under certain conditions. The management of the home furnished oleomargarine to its inmates and did not comply with the conditions of the State statute. The Governor was accordingly indicted under the statute. He was released on *habeas corpus* by the Federal circuit court, and the Supreme Court affirmed. Said the Court:

> "Whatever jurisdiction the State may have over the place or ground where the institution is located, it can have none to interfere with the provisions made by Congress for furnishing food to the inmates of the home, nor has it power to prohibit or regulate the furnishing of any article of food which is approved by the officers of the home, by the Board of Managers and by Congress. Under such circumstances the police power of the State has no application."[329]

The State statute was passed in the exercise of the State police power; yet at once it yielded to the Federal act creating a soldiers' home. Is it possible to maintain that the State police power operates to prevent Federal control over or punishment of a mob which violates treaty rights, while it lies prone before the desire of Congress to feed its old soldiers with oleomargarine?

[328] 173 U. S., 276 (1899). [329] Ibid., p. 283.

Finally, in The Employers' Liability Cases,[330] it is said of interstate commerce:

"An obstruction of such commerce by unlawful violence may be made punishable under the laws of the United States, suppressed by the armies of the United States, or, at the instance of the United States, enjoined in its Courts."[331]

Similarly, and with no possibility of contradiction based on an examination of the Federal decisions, one may say: A violation of rights secured by treaty provisions may be made punishable under the laws of the United States, suppressed by the armies of the United States, or, at the instance of the United States, enjoined in its courts.

An examination of the proceedings of the Federal Constitutional Convention shows that such was the intention of its framers. Article II., Section 3, provides that the President "shall take care that the laws be faithfully executed." At one time in the Convention this clause stood thus in enumerating the powers of the President:

"To call forth the aid of the militia, in order to execute the laws of the Union, *enforce treaties,* suppress insurrections, and repel invasions."

At this stage, according to Madison's journals:

"Mr. Govr Morris moved to strike the following words out of the 18 clause 'enforce treaties,' as being superfluous since treaties were to be 'laws' . . . which was agreed to nem: contrad:"[332]

It is thus conclusively established that when the Constitution says the President shall execute "the laws," treaties, since they have the force of laws, come within this constitutional provision.

It must therefore be concluded from this survey of decided cases that an act of Congress providing for the punishment of violations of treaty provisions, or otherwise tending to secure their enforcement, would be constitutional, and that State police powers, however defined, must yield. Such statute would receive identically the same sanction as the acts enforcing the postal laws or prohibit-

[330] 207 U. S., 463 (1908).
[331] Ibid., p. 525.
[332] Farrand, Vol. II., pp. 389–90.

ing interference with interstate commerce. In the absence of such statutes, the executive has the power to call upon the army of the United States and enforce by its power any treaty provision, in precisely the same manner and under the same conditions as the executive might enforce an act of Congress. This was the emphatic decision in *in re* Debs.[333] Finally, resort may be had either by the United States or by the aggrieved party to the Federal Courts. Such right of redress is incontrovertibly established, but there is one latent practical difficulty. It is this. Treaties may and do operate, when so intended, as acts of Congress, but they are not in practice drawn as legislative acts. They deal with the enunciation of general principles; they do not express clearly and specifically the rights they purpose to confer; nor, if those rights be such as to require remedial provisions, do they contain such provisions. The case of the Mafia riots at New Orleans affords an admirable illustration of this state of things. The treaty with Italy had provided:

"The citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives."[334]

There was in the treaty no provision for the punishment of any person violating it, and no right of action conferred on persons injured or damaged by its violation. There remained therefore only the general promise of the United States to protect Italian citizens—a promise not made effective either by the terms of the treaty or by any act of Congress. The position taken by Mr. Blaine, that the Federal government was powerless to deal with such matters because they were committed to the States, was technically maintainable; but maintainable only because the United States had neglected either by treaty provision or by statute to adopt any means for performing the international obligation it had assumed. The power to make the Federal will supreme existed, was established by numerous decisions, and had been exercised by Congress in a series of statutes. When

[333] *Supra*, pp. 224–229.

[334] "Compilation of Treaties in Force, 1904," at p. 450—Article III. of treaty of 1871 with Italy.

the Italian suitors in the Federal court were finally denied relief against the municipality which had suffered the mob violence,[335] the reason was that neither the treaty nor any Federal statute existed to create liability. Had such statute or treaty provision existed, the decision must have been otherwise.

The United States has by certain provisions of the Revised Statutes created it a crime against the United States to combine to hinder the execution of any *law of* the United States or to deprive any *citizen* of any right secured by the Constitution or *laws* of the United States. In Baldwin *vs.* Franks,[336] despite the strong dissent of Mr. Justice Field and Mr. Justice Harlan, we have seen that these statutes were held not to apply to violations of *treaty provisions* nor to protect *aliens*. As things now are, therefore, treaties are made in a form which puts it beyond the power of the Federal executive to enforce the rights guaranteed thereunder without an amendment to existing statutes, and our diplomatic representatives are left to explain matters as they best can. The remedy is simple. Let Sections 5336, 5508, 5509, 5519 of the Revised Statutes be amended to include the words "treaties of the United States" as well as the words "laws of the United States," and to extend their protection to aliens as well as to citizens.[337] Then let the bill introduced in the Senate on March 1, 1892, and reported with approval on March 30, 1892, be enacted into law,[338] and there will end the grave danger and national disgrace which springs from guaranteeing treaty rights, the power to enforce which is not provided.

It is of course clear that the passage of statutes applicable to all treaties would best subserve the national and international interests involved. There is no constitutional reason, however, why a treaty should not, in itself, provide for the enforcement of the rights it guarantees. The third article of the treaty with Italy has been quoted above. The Italian government having in mind the New Orleans and Tallulah occurrences, might well say to the United States: You have advised us that as matters now are under your

[335] New Orleans *vs.* Abagnatto, 62 Federal, 240 (1894).
[336] *Supra*, pp. 218–220.
[337] See note 19.
[338] See note 20.

existing laws, the only redress we have for such violations as have occurred and may recur, is through the action of the local authorities, often irreconcilably prejudiced against us, and with whom we cannot directly deal. We ask therefore that the Federal government shall protect our citizens when violations of treaty rights occur as fully as it does its own when violations of Federal law occur. We propose the addition of the following clause to Article Three of the treaty between us: The high contracting parties agree that the provisions of this treaty securing protection for the persons and property of Italian citizens who may be within the United States, shall be and are hereby made supreme law within the United States; and that Sections 5336, 5508, 5509, 5519 of the Revised Statutes of the United States shall be and are hereby made applicable to violations of the provisions of this treaty in all cases where they are now applicable to violations of the laws of the United States.

To such a request, the government of the United States could hardly find reasons on which to base a refusal. If a treaty be intended to operate as "legislative act," to again use Marshall's phrase, it should obviously in its draftmanship fulfill the essentials of a legislative act. If rights of action are to be given, those rights should be precisely set forth, if violation of treaty provisions by mobs or otherwise is not to be encouraged, provisions for the punishment of violators should be added and stated with the meticulous phraseology of a criminal statute. The constitutionality of such a procedure has been seen to be demonstrated by the cases analyzed; its wisdom would seem to be obvious. If the government of the United States does not desire to grant a certain privilege, its dignity requires that such desire should be stated through its diplomatic agencies; it cannot in honor use general language purporting to convey a privilege, unless it be prepared simultaneously to provide for its recognition and enforcement.

VI.

The conclusion of the survey of the treaty-making power of the United States attempted in this essay is now reached. The decisions of the Supreme Court of the United States have been assumed

to contain the materials for a final judgment. This is not the place for a demonstration of the correctness of that assumption. If in the judicial power of the United States the nation is not to find the final arbiter of the constitutionality of State and Federal acts, then the fundamental purposes of the framers of the Constitution are utterly frustrated, and with the destruction of that instrument must disappear any thought of a judicial interpretation and enforcement of the treaty-making power. During many years of the nation's life, the individual judgment of the States was set up by some as the final arbiter of constitutional acts; today, the tendency is rather toward making of Congress that supreme tribunal, or perhaps even the crowd, if the recall is to accomplish its logical end. But in this essay the final authority has been recognized to be the Supreme Court. Examining their decisions, we have seen in the making the principles of constitutional law as they affect the treaty-making power. As they have slowly formed before our eyes, these principles have become a part of our thought. Not always have the results reached been logical from the strictly academic point of view; the judges were men of political convictions and emotions, and often was it necessary to pause to consider the conditions under which they spoke, and the political doctrines which filled the air and colored—or even animated—their words. If one would for the moment forget such considerations, time and again did old-time political beliefs, given voice, surprise and warn one. In a subject where sanction for decisions is often to be found in political considerations, one must ever bear in memory the opinions of the times in which the judges wrote. The language of Mr. Justice Story in writing to a friend in 1845, is very pertinent to the thought here attempted to be expressed. He wrote:

"Although my personal position and intercourse with my brethren on the bench has always been pleasant, yet I have long been convinced that the doctrines and opinions of the 'old Court' were daily losing ground, and especially those on great constitutional questions. New men and new opinions have succeeded. The doctrines of the Constitution, so vital to the country, which in former times received the support of the whole Court, no longer maintain their ascendency. I am the last member now living of the

old Court, and I cannot consent to remain where I can no longer hope to see those doctrines recognized and enforced."[339]

Those words were written when, under the influence of Calhoun, a great party was adopting his State rights views, and when southern judges filled the bench. Can one doubt that those facts should be borne in memory when the License Cases,[340] decided in 1847, are quoted as authoritative utterances respecting the true relations of Federal action and State police power? Have they really any more validity today than an old bill of sale for a negro slave could have? This is perhaps too strong a comparison; it will serve to emphasize, even if unduly, the necessity for a discriminative estimate of the value of decisions.

The main question asked in this essay by its title is the *status* of treaty provisions brought into conflict with the attempted exercise of State police powers. The answer is that, without qualification of any kind whatsoever and without limitation by any possible definition of the treaty-making power, a treaty provision as the embodied manifestation of the Federal will is supreme over any and all State enactments made in the exercise of the police power. Such was the idea of those who framed the Constitution and who believed that they had written their purpose into that instrument; such also was the idea of those who favored and those who opposed its ratification by the States. This unanimous contemporary interpretation was stated and applied by the Supreme Court of the United States and pervades and informs every word which John Marshall uttered during the years in which the fundamental canons of constitutional interpretation were evolved. On the death of that greatest English-speaking jurist of all time, the advocates of State rights, soon to become the forces of disunion, gained the ascendancy in the national councils. Members of that party to which Marshall had his whole life long opposed the authority of his office and the distinction of his character, became justices of the Supreme Court and were the men of whom Joseph Story wrote. The decisions of the Court so constituted

[339] Letter to Ezekiel Bacon, April 12, 1845, "Life and Letters of Joseph Story," Vol. II., p. 527.

[340] *Supra*, pp. 187–192.

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respecting State police power, Federal control over commerce, and treaty rights, became so clouded by hazy qualifications and hesitations, that one is justified in the assertion that to political considerations alone can one look to explanations which shall clarify. The Civil War came and passed. New men succeeded to the bench of the Supreme Court. The arms of the North had brought supremacy to the Federal will. It remained unquestioned and unquestionable for years. When, in 1879, instances of its enforcement came before the Supreme Court, the supremacy of that will was, in the cases we have analyzed,[341] established in language which rings with vehement conviction. And so was the return made to the thought and logic of Marshall, who perpetuated in the records of the Supreme Court what the constitutional conventions had declared and established. That decision of 1879 persists as the law today, reiterated in 1895, when in days of financial panic, organized labor, and a sympathetic State executive, doubted the Federal power.[342] Failure to impress the Federal will, intended to be expressed in a treaty, may occur; but the cause must be sought in inadequate acts of Congress and inexplicit treaty provisions. Fortified by the principles established by Marshall and recognized by the Supreme Court today, one may conclude: A violation of rights secured by treaty provisions may be made punishable under the laws of the United States, suppressed by its armies, or enjoined in its courts.

NOTES.

Note 1.—In a letter to Senator Breckinridge of Kentucky, dated August 12, 1803, Jefferson wrote: "The Constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union. The executive in seizing the fugitive occurrence which so much advances the good of their country, have done an act beyond the Constitution. The legislature, in casting behind them metaphysical subtleties, and risking themselves like faithful servants, must ratify and pay for it, and throw themselves on their country for doing for them unauthorized what we know they would have done for themselves had they been in a situation to do it." Jefferson's Works, IV., p. 500.

[341] *Supra,* pp. 212–217.

[342] *Supra,* pp. 224–229.

Note 2.—"Mr. (Madison) observed that the Senate represented the States alone, and that for this as well as other obvious reasons it was proper that the President should be an agent in treaties.

"Mr. Govr. Morris did not know that he should agree to refer the making of treaties to the Senate at all, but for the present wd. move to add as an amendment to the section, after 'treaties'—'but no treaty shall be binding on the United States which is not ratified by a law.'

"Mr. Madison suggested the inconvenience of requiring a legal ratification of treaties of alliance for the purposes of war &c. &c.

"Mr. Ghorum. Many other disadvantages must be experienced if treaties of peace and all negotiations are to be previously ratified—and if not previously, the Ministers would be at a loss how to proceed—What would be the case in G. Britain if the King were to proceed in this manner? American Ministers must go abroad not instructed by the same authority (as will be the case with other Ministers) which is to ratify their proceedings.

"Mr. Govr. Morris. As to treaties of alliance, they will oblige foreign powers to send their Ministers here, the very thing we should wish for. Such treaties could not be otherwise made, if his amendment should succeed. In general he was not solicitous to multiply and facilitate treaties. He wished none to be made with G. Britain, till she should be at war. Then a good bargain might be made with her. So with other foreign powers. The more difficulty in making treaties, the more value will be set on them.

"Mr. Wilson. In the most important treaties, the King of G. Britain being obliged to resort to Parliament for the execution of them, is under the same fetters as the amendment of Mr. Morris will impose on the Senate. It was refused yesterday to permit even the Legislature to lay duties on exports. Under the clause, without the amendment, the Senate alone can make a treaty, requiring all the rice of S. Carolina to be sent to some one particular port.

"Mr. Dickinson concurred in the amendment, as most safe and proper, tho' he was sensible it was unfavorable to the little States; which would otherwise have an equal share in making treaties.

"Docr. Johnson thought there was something of solecism in saying that the acts of a Minister with plenipotentiary powers from one body, should depend for ratification on another body. The example of the King of G. B. was not parallel. Full and complete power was vested in him—If the Parliament should fail to provide the necessary means of execution, the treaty would be violated.

"Mr. Ghorum in answer to Mr. Govr. Morris, said that negotiations on the spot were not to be desired by us, especially if the whole Legislature is to have anything to do with Treaties. It will be generally influenced by two or three men, who will be corrupted by the Ambassadors here. In such a Government as ours, it is necessary to guard against the Government itself being seduced.

"Mr. Randolph observing that almost every speaker had made objections to the clause as it stood, moved in order to a further consideration of the

subject, that the motion of Mr. Govr. Morris should be postponed, and on this question

"Massts. no. Cont. no. N. J.—ay—Penna. ay. Del. ay. Md. ay. Va. ay—N. C. no. S. C. no.—Geo. no.

"On Mr. Govr. Morris motion

"Massts. no. Cont. no. N. J. no. Pa. ay—Del. no. Md. no. Va. no. N. C. divd S. C. no. Geo. no."

Note 3.—The report in detail was: "Mr. Madison then moved to authorize a concurrence of two thirds of the Senate to make treaties of peace, without the concurrence of the President—The President he said would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of peace. Mr. Butler 2ded. the motion.

"Mr. Ghorum thought the precaution unnecessary as the means of carrying on the war would not be in the hands of the President, but of the Legislature.

"Mr. Govr. Morris thought the power of the President in this case harmless; and that no peace ought to be made without the concurrence of the President, who was the general guardian of the National interests.

"Mr. Butler was strenuous for the motion, as a necessary security against ambitious and corrupt Presidents. He mentioned the late perfidious policy of the stakeholder in Holland; and the artifices of the Duke of Marlbro' to prolong the war of which he had the management.

"Mr. Gerry was of opinion that in treaties of peace a greater rather than less proportion of votes was necessary, than in other treaties. In treaties of peace the dearest interests will be at stake, as the fisheries, territories &c. In treaties of peace also there is more danger to the extremities of the Continent, of being sacrificed, than on any other occasions.

"Mr. Williamson thought that treaties of peace should be guarded at least by requiring the same concurrence as in other treaties.

"On motion of Mr. Madison and Mr. Butler

"N. H. no. Mas. no. Ct. no. N. J. no. Pa. no. Del. no. Md. ay. Va. no. N. C. no. S. C. ay. Geo. ay.

"On the part of the clause concerning treaties amended by the exception as to treaties of peace.

"N. H. ay. Mas. ay. Ct. ay. N. J. no. Pa. no. Del. ay. Md. ay. Va. ay. N. C. ay. S. C. ay. Geo. no."

Note 4.—Washington's message was as follows:

"To the Gentlemen of the House of Representatives of the United States:

"With the utmost attention I have considered your resolution of the 24th instant, requesting me to lay before your House, a copy of the instructions to the minister of the United States, who negotiated the treaty with the King of Great Britain, together with the correspondence and other documents relative to that treaty, excepting such of the said papers, as any existing negotiation may render improper to be disclosed.

"In deliberating upon this subject, it was impossible for me to lose sight of the principles which some have avowed in its discussion, or to avoid extending my views to the consequences which must flow from the admission of that principle.

"I trust that no part of my conduct has ever indicated a disposition to withhold any information which the constitution has enjoined it upon the president as a duty to give, or which could be required of him by either house of congress as a right; and with truth I affirm, that it has been, as it will continue to be, while I have the honor to preside in the government, my constant endeavor to harmonize with the other branches thereof, so far as the trust delegated to me by the people of the United States, and my sense of the obligation it imposes, to preserve, protect and defend the constitution will permit.

"The nature of foreign negotiations require caution, and their success must often depend on secrecy; and even when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief to other persons. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the president, with the advice and consent of the senate, the principle on which that body was formed confining it to a small number of members. To admit then a right in the house of representatives to demand, and to have as a matter of course, all the papers respecting a negotiation with a foreign power, would be to establish a dangerous precedent.

"It does not occur that the inspection of the papers asked for, can be relative to any purpose under the cognizance of the house of representatives, except that of an impeachment, which the resolution has not expressed. I repeat that I have no disposition to withhold any information which the duty of my station will permit, or the public good shall require to be disclosed; and in fact, all the papers affecting the negotiation with Great Britain were laid before the senate, when the treaty itself was communicated for their consideration and advice.

"The course which the debate has taken on the resolution of the house, leads to some observations on the mode of making treaties under the constitution of the United States.

"Having been a member of the general convention, and knowing the principles on which the constitution was formed, I have ever entertained but one opinion upon this subject; and from the first establishment of the government to this moment, my conduct has exemplified that opinion. That the power of making treaties, is exclusively vested in the president, by and with the advice and consent of the Senate, provided two thirds of the senators present concur; and that every treaty so made and promulgated, thenceforward becomes the law of the land. It is thus that the treaty-making power has been understood by foreign nations; and in all the treaties made with them, we have declared, and they have believed, that when ratified by the

president with the advice and consent of the senate, they become obligatory. In this construction of the constitution, every house of representatives has heretofore acquiesced; and until the present time, not a doubt or suspicion has appeared to my knowledge, that this construction was not the true one. Nay, they have more than acquiesced; for until now, without controverting the obligation of such treaties, they have made all the requisite provisions for carrying them into effect.

"There is also reason to believe that this construction agrees with the opinions entertained by the state conventions when they were deliberating on the constitution; especially by those who objected to it, because there was not required in commercial treaties, the consent of two thirds of the whole number of the members of the senate, instead of two thirds of the senators present; and because in treaties respecting territorial and certain other rights and claims, the concurrence of three fourths of the whole number of the members of both houses respectively, was not made necessary.

"It is a fact declared by the general convention and universally understood, that the constitution of the United States was the result of a spirit of amity and mutual concession. And it is well known, that under this influence, the smaller states were admitted to an equal representation in the senate with the larger states; and that this branch of the government was invested with great powers; for on the equal participation of those powers, the sovereignty and political safety of the smaller states were deemed essentially to depend.

"If other proofs than these and the plain letter of the constitution itself be necessary to ascertain the point under consideration, they may be found in the journals of the general convention which I have deposited in the office of the department of state. In these journals it will appear, that a proposition was made 'that no treaty should be binding on the United States which was not ratified by a law,' and that the proposition was explicitly rejected.

"As therefore it is perfectly clear to my understanding that the assent of the house of representatives is not necessary to the validity of a treaty; as the treaty with Great Britain exhibits in itself all the objects requiring legislative provision; and on these the papers called for can throw no light; and as it is essential to the due administration of the government that the boundaries fixed by the constitution between the different departments should be preserved; a just regard to the constitution, and to the duty of my office, under all the circumstances of this case, forbid a compliance with your request." Richardson's "Messages of the Presidents," Vol. I., pp. 194–6.

Note 5.—"*Resolved* that it being declared by the Second Section of the Second Article of the Constitution that the President shall have power, by and with the advice and consent of the Senate, to make treaties, the House do not claim any agency in making treaties, but that when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must be dependent for its execution, as to such stipulations, on a law or laws to be passed by Congress. And it is the Constitutional right and duty of the House in all such cases to deliberate on the

expediency or inexpediency of carrying such treaty into effect, or to determine an act thereon as in their judgment may be most conducive to the public good." Annals of Congress, 4th Congress, 1st Sess., p. 771.

Note 6.—To support his proposition that the treaty-making power does not extend to subjects committed to the legislation of Congress, Professor Mikell says:

"One branch of the treaty-making power itself has gone on record denying this power. In 1844, April 12, a treaty was signed at Washington, between the United States and the Republic of Texas, by which Texas transferred to the United States all its rights of separate and independent sovereignty and jurisdiction. Three resolutions were introduced by Mr. Benton, May 13. They declared that the ratification of the treaty would be the adoption by the United States of the Texan War, and that the treaty-making power of the President and Senate did not include the power of making war, either by declaration or adoption. On June 8, the treaty was rejected by the Senate by a vote of 35 to 16.

"Immediately preceding the rejection of the treaty a resolution was introduced by Mr. Henderson declaring that 'such annexation would be properly achieved . . . by an act of Congress admitting the people of Texas, with defined boundaries, as a new State into the Union.'

"This course was followed and on March 1st, 1845, a joint resolution to that effect was approved."

This handling and interpretation of the political events accompanying Texan annexation, is extraordinary. The clearly apparent explanation of the actions of the two Houses of Congress, written large in the debates and in American history, lies in the struggle over slavery, which ended in the Civil War. There are, however, several recorded facts which, with detriment to Professor Mikell's argument but in the interests of accuracy, should be added to his account. These are: that Mr. Benton's resolutions did not pass; that Mr. Henderson's resolution did not pass; that the joint resolution was the work of a new session of Congress held after a new election.

Note 7.—The first eight amendments to the Constitution are as follows:

Article I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Article II. A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Article III. No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor, in time of war, but in a manner to be prescribed by law.

Article IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searchers and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war, or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Article VII. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact, tried by a jury, shall be otherwise reëxamined in any court of the United States than according to the rules of the common law.

Article VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Note 8.—The language of the court is as follows: "That it was competent for the two countries by treaty to have superseded a prior Act of Congress on the same subject is not to be doubted; for otherwise the declaration in the Constitution that a treaty, concluded in the mode prescribed by that instrument, shall be the supreme law of the land, would not have due effect. As Congress may by statute abrogate, so far at least as this country is concerned, a treaty previously made by the United States with another nation, so the United States may by treaty supersede a prior Act of Congress on the same subject. In Foster & Elam *vs.* Neilson, 2 Pet. 253, 314, it was said that a treaty 'was to be regarded in Courts of justice as equivalent to an Act of the legislature, whenever it operates of itself without the aid of any legislative provision.' In the case of The Cherokee Tobacco, 11 Wall., 616, 621, this Court said 'a treaty may supersede a prior Act of Congress, and an Act of Congress may supersede a prior treaty.' So in the Head Money Cases, 112 U. S., 580, 599, this Court said: 'So far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the Courts of this country, it is subject to such Acts as Congress may pass for its enforcement, modification or repeal.' Again, in Whitney *vs.* Robertson, 124 U. S., 190, 194: 'By the Constitution a treaty is placed on the same footing, and made of like obligation, with an Act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the Courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will

control the other, provided always that the stipulation of the treaty on the subject is self-executing.' See also Taylor *vs.* Morton, 2 Curtis, 454, 459; Clinton Bridge Case, 1 Woolworth, 155; Ropes *vs.* Church, 8 Blatchf., 304; 2 Story on Const., Sec. 1838. Nevertheless, the purpose by statute to abrogate a treaty or any designated part of a treaty, or the purposes by treaty to supersede the whole or a part of an Act of Congress, must not be lightly assumed, but must appear clearly and distinctly from the words used in the statute or in the treaty."

Note 9.—The language of the court is as follows: "As was said by Chief-Justice Marshall in The Peggy, 1 Cranch, 103, 110: 'Where a treaty is the law of the land, and as such affects the rights of parties litigating in Court, that treaty as much binds those rights, and is as much to be regarded by the Court as an Act of Congress.' And in Foster *vs.* Neilson, 2 Pet. 253, 314, he repeated this in substance: 'Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in Courts of justice as equivalent to an Act of the legislature, whenever it operates of itself without the aid of any legislative provision.' So in Whitney *vs.* Robertson, 124 U. S., 190: 'By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the Courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always that the stipulation of the treaty on the subject is self-executing.' To the same effect are The Cherokee Tobacco, 11 Wall., 616, and the Head Money Cases, 112 U. S., 580."

Note 10.—Mr. Justice Wilson said: "But even if Virginia had the power to confiscate, the treaty annuls the confiscation. The fourth Article is well expressed to meet the very case: it is not confined to debts existing at the time of making the treaty; but is extended to debts heretofore contracted. It is impossible by any glossary, or argument, to make the words more perspicuous, more conclusive, than by a bare recital. Independent, therefore, of the Constitution of the United States (which authoritatively inculcates the obligation of contracts) the treaty is sufficient to remove every impediment founded on the law of Virginia. The State made the law; the State was a party to the making of the treaty; a law does nothing more than express the will of a nation; and a treaty does the same."

Note 11.—Mr. Justice Iredell said: "The opinion I have long entertained, and still do entertain, in regard to the operation of the fourth article is, that the stipulation in favor of creditors, so as to enable them to bring suits, and recover the full value of other debts, could not at that time be carried into effect in any other manner, than by a repeal of the statutes of the different States, constituting the impediments to their recovery, and the passing of such other acts as might be necessary to give the recovery entire efficacy, in execution of the treaty."

Note 12.—Additional comment upon this case made by Professor Mikell is as follows: "In Ware *vs.* Hylton, it was decided that a law of Virginia, passed in 1777, which provided that any citizen of Virginia, owing money to a subject of Great Britain, might pay the same into the loan office of the State and be discharged of the debt, was abrogated by the treaty of 1783, between the United States and England. This treaty provided that the creditors of either of the contracting parties should meet with no lawful impediment to the recovery of all debts theretofore contracted.

"It is submitted that this case is no authority for the broad proposition that the treaty-making power is not limited by the reserved rights of the States. In the first place the treaty in question was entered into by the Continental Congress before the adoption of the present Constitution. Now the method of entering into a treaty under the confederation differed from that under the Constitution. Under the confederation each state was entitled to only one vote in Congress and Congress could make no treaty without the consent of nine States. As there were thirteen states in the confederation, this meant that the assent of three-fourths of all the States was necessary to the making of a treaty. Under the present Constitution a treaty is not so directly the act of a State, and that assent of three-fourths of the States is not necessary. Each State has two Senators and they may not vote in unison; but, more important is the difference that the Constitution does not require the assent of three-fourths or even of two-thirds of the States to the making of a treaty, but only the assent of two-thirds of the Senators present when the treaty is voted on. It might well be then that greater force should be allowed to a treaty negotiated by the States in the Continental Congress where they acted much as independent States in a league, than under the present Constitution where the vote on treaties is not by States at all. The position of the States in the Confederation seems to be referred to by Wilson, J. where he says (p. 281): 'The State made the law; the State was a party to the making of the treaty; a law does nothing more than express the will of a nation; a treaty does the same.' Again the decision in Ware *vs.* Hylton that a treaty overrides a state law confiscating debts due foreigners is not a decision that the treaty-making power under the Constitution can be used to deprive a State of any of its reserved rights; for while this right of confiscation did exist in Virginia before the present Constitution it was not only not reserved, but is expressly surrendered by the Constitution—in that section providing that no State shall pass any law impairing the obligations of a contract.

"Indeed, the very reason the States were so careful to insist on an expression of their reserved rights, in framing the present Constitution, was because, by the new Constitution, they had in general created a more centralized government than existed under the Confederation.

"What the case really decides is that any treaty made under the Articles of Confederation and which was valid under the Articles of Confederation was valid by adoption after the Constitution was adopted." *American Law Register,* Vol. 57, pp. 540–2.

Note 13.—The language of the Court is as follows: "In 1796, but a few years later, this Court said: 'If doubts could exist before the adoption of the present national government, they must be entirely removed by the sixth article of the Constitution, which provides that "all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." There can be no limitation on the power of the people of the United States. By their authority the State Constitutions were made, and by their authority the Constitution of the United States was established; and they had the power to change or abolish the State Constitution or to make them yield to the general government and to treaties made by their authority. A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a State legislature can stand in its way. If the Constitution of a State (which is the fundamental law of the State and paramount to its legislature) must give way to a treaty and fall before it, can it be questioned whether the less power, an act of the State legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the Constitution and laws of any individual State, and their will alone is to decide. If a law of a State contrary to a treaty is not void, but voidable only, by a repeal or nullification by a State legislature, this certain consequence follows,—that the will of a small part of the United States may control or defeat the will of the whole.' Ware *vs.* Hylton, 3 Dall., 199. It will be observed that the treaty-making clause is retroactive as well as prospective. The treaty in question, in Ware *vs.* Hylton, was the British treaty of 1783, which terminated the war of the American Revolution. It was made while the Articles of Confederation subsisted. The Constitution, when adopted, applied alike to treaties 'made and to be made.' . . .

"In Chirac *vs.* Chirac (2 Wheat., 259), it was held by this Court that a treaty with France gave to her citizens the right to purchase and hold land in the United States, removed the incapacity of alienage and placed them in precisely the same situation as if they had been citizens of this country. The State law was hardly adverted to, and seems not to have been considered a factor of any importance in this view of the case. The same doctrine was reaffirmed touching this treaty in Carneal *vs.* Banks (10 id., 181), and with respect to the British treaty of 1794, in Hughes *vs.* Edwards (9 id., 489). A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of a State. Orr *vs.* Hodgson, 4 id., 453. By the British treaty of 1794, 'all impediment of alienage was absolutely levelled with the ground despite the laws of the States. It is the direct constitutional question in its fullest condition. Yet the Supreme Court held that the stipulation was within the constitutional powers of the Union.'"

Note 14.—As is well known, after this decision, Congress, passed the Wilson Act (26 Stat., 713) which was construed by the Supreme Court as constituting an adoption by Congress of a special rule enabling the States

to extend their otherwise non-existent authority to liquors shipped from other States before they became commingled with the property in the State by sale in the original package. It was also construed as not applicable to interstate shipments made to a consignee for his own use and not for sale. For the particular application of these principles, see:

In re Rahrer, 140 U. S., 545 (1891).
Crutcher *vs.* Kentucky, 141 U. S., 47 (1891).
Brennan *vs.* Titusville, 153 U. S., 289 (1894).
Vance *vs.* Vandercook, 170 U. S., 438 (1898).
Caldwell *vs.* North Carolina, 187 U. S., 622 (1903).
N. & W. R. R. Co. *vs.* Sims, 191 U. S., 441 (1903).
Am. Ex. Co. *vs.* Iowa, 196 U. S., 133 (1905).
Pabst Brewing Co. *vs.* Crenshaw, 198 U. S., 17 (1905).
Foppiano *vs.* Speed, 199 U. S., 501 (1905).
Heyman *vs.* Southern Ry. Co., 203 U. S., 270 (1906).
Rearick *vs.* Pennsylvania, 203 U. S., 507 (1906).
Delamater *vs.* So. Dakota, 205 U. S., 93 (1907).

In this connection, it may be well to note that in a recent work on "The Treaty Power under the Constitution of the United States," by R. T. Devlin, Esq.—a work valuable for the careful collection of authorities and precedents—one finds in the Index under the caption "State supreme in police power," one case cited, and one only, as controlling this subject. It is the case of Cantini *vs.* Tillman, 54 Fed. Rep., 969 (1893). This is also cited by Professor Mikell as showing that the judge did "not conceive of the cases beginning with Ware *vs.* Hylton, and ending with Hauenstein *vs.* Lynham, as having established the doctrine of the supremacy of the treaty-making power over the reserved powers of the States," p. 553. The suit was one brought to determine the constitutionality of the South Carolina "Dispensary Act." The Federal district judge, Judge Simonton, sat as circuit judge, and held that the Wilson Act was applicable, and that the South Carolina statute was constitutional. After disposing of the case on the authority of the Supreme Court decisions construing the Wilson Act, Judge Simonton added:

"It is urged in behalf of those complainants that they are Italian subjects, and are protected by the treaty stipulations between Italy and the United States. . . .

"Under these articles the complainants have the same rights as citizens of the United States. It would be absurd to say that they had greater rights. We have seen that the right to sell intoxicating liquors is not a right inherent in a citizen, and is not one of the privileges of American citizenship; that it is not within the protection of the fourteenth amendment; that it is within the police power. The police power is a right reserved by the States, and has not been delegated to the general government. In its lawful exercise, the States are absolutely sovereign. Such exercise cannot be affected by any treaty stipulation," p. 976.

No extended comment is necessary. In the first part of his opinion the judge had shown that the Act of Congress had made the State statute con-

stitutional. He cannot be presumed to have intended by his closing words to contradict his own argument, to say that, apart from that act, the statute was constitutional, and Leisy *vs.* Hardin was not law. Moreover, he had just shown that the treaty had by its terms no application whatever; his language therefore must be interpreted with reference to the facts before him and in relation to his whole opinion. In no event, can it properly be cited as establishing the statement of Mr. Devlin, or the contention of Professor Mikell. It is significant that neither, while quoting at length this and the License Cases, make the slightest reference to Leisy *vs.* Hardin and cognate decisions.

Note 15.—The facts necessary to a full comprehension of *all* the questions involved in this dispute are too complex to be inserted in the body of this essay, as they are strictly relevant only to questions other than the one discussed. Inasmuch, however, as they afford an admirable illustration of how, practically, the question of the right of the United States to enforce treaty provisions, may arise, they are here stated in the language of Mr. Root, the then Secretary of State: "The treaty of November 22, 1894, between the United States and Japan provided, in the first article:

"'The citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the territory of the other contracting party and shall enjoy full and perfect protection for their persons and property. . . . In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind; to the succession to personal estate, by will or otherwise, and the disposal of property of any sort and in any manner whatsoever which they may lawfully acquire, the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties, and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects or citizens or subjects of the most favored nation.'

"The Constitution of the State of California provides, in Article 9:

"'SECTION 1. A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement.

"'SECTION 5. The legislature shall provide for a system of common schools, by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established.

"'SECTION 6. The public school system shall include primary and grammar schools, and such high schools, evening schools, normal schools and technical schools as may be established by the legislature, or by municipal or district authority. The entire revenue derived from the State school fund and from the general State school tax shall be applied exclusively to the support of the primary and grammar schools.'

"The Statutes of California establish the public school system required by the Constitution. They provide that the State comptroller must each year estimate the amount necessary to 'raise the sum of seven dollars for each

census child between the ages of five and seventeen years in the said State of California, which shall be the amount necessary to be raised by ad valorem tax for the school purposes during the year.'

"The Statutes further provide that the board of education of San Francisco shall have authority 'to establish and enforce all necessary rules and regulations for the government and efficiency of the schools (in that City) and for the carrying into effect the school system; to remedy truancy; and to compel attendance at school of children between the ages of six and fourteen years, who may be found idle in public places during school hours.'

"The Statutes further provide, in Section 1662 of the School law: 'Every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age residing in the district, and the board of school trustees, or city board of education, have power to admit adults and children not residing in the district, whenever good reasons exist therefor. Trustees shall have the power to exclude children of filthy or vicious habits, or children suffering from contagious or infectious diseases, and also to establish separate schools for Indian children and for children of Mongolian or Chinese descent. When such separate schools are established, Indian, Chinese, or Mongolian children must not be admitted into any other school.

"On the 11th of October, 1906, the board of education of San Francisco adopted a resolution in these words:

'*Resolved:* That in accordance with Article X, Section 1662, of the school law of California, principals are hereby directed to send all Chinese, Japanese, or Korean children to the Oriental Public School, situated on the South side of Clay Street, between Powell and Mason Streets, on and after Monday, October 15, 1906.'

"The school system thus provided school privileges for all resident children, whether citizen or alien, all resident children were included in the basis for estimating the amount to be raised by taxation for school purposes; the fund for the support of the school was raised by general taxation upon all property of resident aliens as well as of citizens; and all resident children, whether of aliens or of citizens, were liable to be compelled to attend the schools. So that, under the resolution of the board of education, the children of resident aliens of all other nationalities were freely admitted to the schools of the city in the neighborhood of their homes, while the children of Indians, Chinese and Japanese were excluded from those schools, and were not only deprived of education unless they consented to go to the special oriental school on Clay Street, but were liable to be forcibly compelled to go to that particular school.

"After the passage of this resolution, admission to the ordinary primary schools of San Francisco was denied to Japenese children, and thereupon the government of Japan made representations to the government of the United States that inasmuch as the children of residents who were citizens of all other foreign countries were freely admitted to the schools, the citizens of Japan residing in the United States were, by that exclusion, denied the same privileges, liberties, and rights relating to the right of residence which were

accorded to the citizens or subjects of the most favored nation. The question thus raised was promptly presented by the government of the United States to the federal court in California, and also to the state court of California, in appropriate legal proceedings. . . .

"It is obvious that three distinct questions were raised by the claim originating with Japan and presented by our national government to the courts in San Francisco. The first and second were merely questions of construction of the treaty. Was the right to attend the primary schools a right, liberty, or privilege of residence? and, if so, was the limitation of Japanese children to the oriental school and their exclusion from the ordinary schools a deprivation of that right, liberty, or privilege? . . .

"The other question was whether, if the treaty had the meaning which the government of Japan ascribed to it, the government of the United States had the constitutional power to make such a treaty agreement with a foreign nation which should be superior to and controlling upon the laws of the State of California." *American Journal of International Law,* Vol. I., Part I., pp. 274-276-277.

Note 16.—"It would, I believe, be entirely competent for Congress to make offenses against the treaty rights of foreigners domiciled in the United States cognizable in the Federal Courts. This has not, however, been done, and the Federal officers and Courts have no power in such cases to intervene, either for the protection of a foreign citizen or for the punishment of his slayers. It seems to me to follow, in this state of the law, that the officers of the State charged with police and judicial powers in such cases must in the consideration of international questions growing out of such incidents be regarded in such sense as Federal agents as to make this Government answerable for their acts in cases where it would be answerable if the United States had used its constitutional power to define and punish crime against treaty rights." Richardson's "Messages of the Presidents," Vol. 9, p. 183.

Note 17.—"A bill to provide for the punishment of violations of treaty rights of aliens was introduced in the Senate March 1, 1892, and reported favorably March 30th. Having doubtless in view the language of that part of Article III, of the treaty of February 26, 1871, between the United States and Italy, which stipulates that 'the citizens of each of the high contracting parties shall receive, in the States and Territories of the other, most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives,' the bill so introduced and reported provided that any act committed in any State or Territory of the United States in violation of the rights of a citizen or subject of a foreign country secured to such citizen or subject by treaty between the United States and such foreign country and constituting a crime under the laws of the State or Territory shall constitute a like crime against the United States and be cognizable in the Federal courts. No action was taken by Congress in the matter.

"I earnestly recommend that the subject be taken up anew and acted

upon during the present session. The necessity for some such provision abundantly appears. Precedent for constituting a Federal Jurisdiction in criminal cases where aliens are sufferers is rationally deducible from the existing statute, which gives to the district and circuit Courts of the United States jurisdiction of civil suits brought by aliens where the amount involved exceeds a certain sum. If such jealous solicitude be shown for alien rights in cases of merely civil and pecuniary import, how much greater should be the public duty to take cognizance of matters affecting the lives and the rights of aliens under the settled principles of international law no less than under treaty stipulation, in cases of such transcendent wrong doing as mob murder, especially when experience has shown that local justice is too often helpless to punish the offenders." Richardson's "Messages of the Presidents," Supplement, 1899–1902, pp. 69–70.

Note 18.—"I renew the urgent recommendations I made last year that the Congress appropriately confer upon the Federal Courts jurisdiction in this class of international cases where the ultimate responsibility of the Federal Government may be involved, and I invite action upon the bills to accomplish this which were introduced in the Senate and House. It is incumbent upon us to remedy the statutory omission which has led, and may again lead, to such untoward results. I have pointed out the necessity and the precedent for legislation of this character. Its enactment is a simple measure of previsory justice toward the nations with which we as a sovereign equal make treaties requiring reciprocal observance." Ibid., p. 128.

Note 19.—These Sections so amended would read substantially as follows:

Section 5336. If two or more persons in any state or territory conspire . . . by force to prevent, hinder, or delay the execution of any law or treaty of the United States; . . . each of them shall be punished by a fine of not less than five hundred dollars and not more than five thousand dollars; or by imprisonment with or without hard labor, for a period not less than six months nor more than six years, or by both such fines and imprisonment.

Section 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any person being within any state or territory in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States, or under any treaty of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars, and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the constitution, or laws of the United States.

Section 5509. If in the act of violating any provision in either of the two preceding sections any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the state in which the offence is committed.

Note 20.—This act as reported was as follows: "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that any act committed in any state or territory of the United States in violation of the rights of a citizen or subject of a foreign country secured to such citizen or subject by treaty between the United States and such foreign country, which act constitutes a crime under the laws of such state or territory, shall constitute a like crime against the peace and dignity of the United States, punishable in like manner as in the courts of said state or territories, and within the period limited by the laws of such state or territory, and may be prosecuted in the courts of the United States, and upon conviction, the sentence executed in like manner as sentences upon convictions for crimes under the laws of the United States."

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